Office Supreme Court, U.S.
FILED
DEC 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal From the United States District Court for the District of New Jersey

STATEMENT AS TO JURISDICTION

JAMES F. X. O'BRIEN
17 Academy St.
Newark, N. J.

JACK R. TURNEY, JR.
EUGENE T. LIIPFERT
2001 Massachusetts Ave., N.W.
Washington, D. C.

Attorneys for Appellants

Dated: December 28, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	5
Statement of the Case	7
Questions Substantial	11
Argument	19
1. The Court Below Erred in Upholding the Commission's Construction of the Statute and Assertion of Jurisdiction Based Thereon	19
(a) The Construction Violates the Prohibition of Section 211(a) of the Act	19
(b) The Construction Destroys the Statutory Distinction Between Special and Charter Service	20
(c) The Commission's Construction Defeats the Congressional Intent and Effective Regulation	25
(d) The Commission Cannot Lawfully Issue a License Based Upon an Unlawful Operation	29
2. The Court Below Erred in Upholding the Commission's Authorization of Operations Which Will Necessarily Result in Violations of Its Regulations and in Amendment of Those Regulations Without Compliance With Prescribed Rule-Making Procedures	29

Page

3. The Court Below Erred in Failing to Find That the Commission's Interpretations of the Act Are Erroneous 31

4. The Court Below Erred in Misconstruing and Failing to Discharge Its Duties as a Reviewing Court on the Type of Issues Presented to It 33

Conclusion 35

TABLE OF CASES

Acme Fast Freight, Inc., Common Carrier Application (1938), 8 M.C.C. 211 and (1939), 17 M.C.C. 549... 28

Acme Fast Freight, Inc. v. United States (1940), 309 U.S. 638 28

Asbury Park-New York Transit Corp. v. Bingler Vacation Tours, Inc. (1954), 62 M.C.C. 731, 738-9 .....21, 22

August Bingler—Common Carrier Application (1942), 41 M.C.C. 839 .....23, 28

Bingler Vacation Tours, Inc. v. United States and the Interstate Commerce Commission (D.C.N.J. 1955), 132 F. Supp. 793 and 350 U.S. 921 .....21, 22

Burnette v. Chicago Portrait Co. (1931), 285 U.S. 1...34, 35

Copex Company, Inc. (1939), 14 M.C.C. 689 32

Crescent Express Lines, Inc. v. United States (1943), 320 U.S. 401, 406 .....12, 20, 21, 25

East Texas Motor Freight Lines, Inc. v. Frozen Food Express (1956), 350 U.S. 49; (1956) 351 U.S. 49..23, 34

Faulk Broker Application (1938), 10 M.C.C. 145 32

Fordham Bus Corp. Common Carrier Application (1941), 29 M.C.C. 293, 297 20

Fordham Bus Corp. v. United States (U.S.D.C.N.Y.), 41 F. Supp. 712 .....20, 21

Gulf State Steel Company v. United States (1932), 287 U.S. 32 25

Page

Interstate Commerce Commission v. Chicago Food Manufacturers Pool Car Group, et al, U.S.D.C.N.D. Ill. (1941), 39 F. Supp. 283 32

McMahon Transport Co.—Extension—Special Operations (1952), 54 M.C.C. 813 .....24, 28

Monumental Motor Tours, Inc., Extension—Special Operations (1955), 64 M.C.C. 814 .....24, 28

National Federation of Textiles, Broker Application (1938), 10 M.C.C. 407 32

National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc. v. United States of America and the Interstate Commerce Commission (1954), 122 F. Supp. 876 10

Nevins Distributors, Inc., Broker Application (1950), 51 M.C.C. 383 32

Regulations—Special or Chartered Party Service (1941), 29 M.C.C. 25 .....3, 12, 21, 29

Rhode Island Bus Company, Extension—Special Operations (1955), 63 M.C.C. 813 .....24, 28

Riverside Tours, Inc., Extension—Special Operations (1955), 63 M.C.C. 387 .....24, 28

School District 2 Fractional v. United States (U.S. C.A., 6th Circuit 1956), 229 F. 2d 681, 686 30

Tauck Tours, Inc., Extension—New York, N. Y., Docket No. MC-29488, Sub 3 8

Tauck Tours, Inc., Extension—New York, N. Y. (1949), 49 M.C.C. 491, 497 .....8, 13

Tauck Tours, Inc., Extension—New York, N. Y. (1950), 52 M.C.C. 373 10

Tauck Tours, Inc., Extension—New York, N. Y. (1952), 54 M.C.C. 291 10

Tauck Tours, Inc., Extension—New York, N. Y. (1955), 63 M.C.C. 493 10

United States v. American Trucking Associations, Inc. (1940), 310 U.S. 534 25

Page

United States v. Carolina Freight Carriers Corp. (1941), 315 U.S. 475, 485-486 ..... 23, 32

United States v. Chicago Heights Trucking Co. (1940), 310 U.S. 344 28

United States v. Missouri Pacific Railroad Company (1928), 278 U.S. 269 35

United States v. Rosenblum Truck Lines (1942), 315 U.S. 50 25

Woods v. Benson Hotel Corporation (1949, cc8th), 177 F. 2d 543 34

STATUTES

Administrative Procedure Act:

Section 2(c) 7

Section 4 7

Section 10(e) 7, 33

Interstate Commerce Act:

Title 5 U.S.C.

217(d) 7

Title 49 U.S.C.

Section 203(a)(18) 5, 7, 32

Section 206 6

Section 207 ..... 4, 31

Section 207(a) 6

Section 208(a) 6

Section 208(c) 4, 6, 29, 31

Section 211(a) 6, 8, 9, 19, 20, 23

Section 211(b) 6

Page

United States Code:

Title 5

Section 1001 7
Section 1003 7
Section 1009 7

Title 28

Section 1253 2
Section 1336 2
Section 1398 2
Section 2101(b) 2
Section 2321 2
Section 2325 2

Title 49

Section 1 5
Section 301 5
Section 305(g) and (h) 2
Section 901 5
Section 1001 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal From the United States District Court for the District of New Jersey

---

STATEMENT AS TO JURISDICTION

National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., Appellants, present this their statement in support of the jurisdiction of the Supreme Court to review the judgment of the United States District Court for the District of New Jersey in this cause.

OPINION BELOW

The last opinion of the District Court is reported in 143 F. Supp. 689. A copy is appended as Appendix A. Its Findings of Fact and Conclusions of Law are appended as Appendix B. Its earlier opinion remanding the cause to the Interstate Commerce Commission is appended as Appendix C.

JURISDICTION

The suit below was brought by Appellants, under Title 49 U.S.C. Secs. 305(g) and (h) and Title 28 U.S.C. Secs. 1336, 1398, 2284, 2321-2325, and Title 5 U.S.C. Sec. 1009, to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission entered April 18, 1955, granting Tauck Tours, Inc. a license to extend its operations as a broker of motor carrier transportation.

The judgment of the District Court dismissing the complaint was entered August 17, 1956. Notice of Appeal was filed October 11, 1956.

By orders dated December 10, and 17, 1956, the time for docketing the case and filing the Statement of Jurisdiction was extended, first to December 17, 1956 and then to December 31, 1956, due to illness of counsel.

Jurisdiction of the Supreme Court to review the decision of the District Court on direct appeal rests on Title 28 U.S.C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED

1. The principal question is whether the court below and the Interstate Commerce Commission correctly construed the Interstate Commerce Act:

1.1 To authorize brokers as a class to employ, for the transportation of passengers to whom the broker sells individual tickets, motor carriers whose sole authority over the routes traversed is to provide charter service;

1.2 To authorize motor carriers as a class, under their charter-service authority, to transport passengers who buy individual tickets from brokers;

1.3 To give the Interstate Commerce Commission jurisdiction to issue a brokerage license to an individual applicant, based solely upon a proposal to use charter-service carriers for the transportation of its individually-ticketed passengers.

In the case below, the Interstate Commerce Commission, with the approval of the District Court, holds that the Act may be so construed, provided (a) the passengers travel on the same trip for pleasure,[1] (b) each ticket recites that the broker is the agent, "individually and collectively" of the passenger, (c) the broker makes the contract with the carrier in the name of the passengers instead of its own name, and (d) the broker does not receive a commission from the carrier for the sale of the tickets. On the basis of that construction, a license was granted to the applicant broker.

2. At the time the Commission issued its order in the case below, there were in effect regulations, prescribed by the Commission in a formal rule-making proceeding,[2] which expressly prohibit carriers from

[1] Viz, on a sightseeing or pleasure tour, on a skiing trip, on a trip to attend an athletic, social, religious, educational, musical, or theatrical event, or for a similar purpose.

[2] Regulations—Special or Chartered Party Service (1941), 29 M.C.C. 25.

transporting, under their charter-service authority, any passengers who buy individual tickets or make individual arrangements for their transportation. The second question presented is whether the Interstate Commerce Commission, in a proceeding involving an application for a brokerage license under Section 211 of the Interstate Commerce Act,[3] can lawfully ignore its own regulations and authorize operations which will result in violations of such regulations and the Act as construed in the *Regulations* proceeding, and whether the course of conduct which the Commission has purported to authorize must not be regarded as an exception to its Regulations, and, therefore, a rule-amendment, which is invalid because it was adopted by the Commission without observing the requirements of the Administrative Procedure Act.[4]

3. The third question is whether the following constructions of the statute by the Commission, which were upheld by the District Court, unlawfully apply different and stricter standards to the same term in one instance than another, and are erroneous in law:

(a) Its construction of authorized "charter" service, within the meaning of both Section 207 and Section 208(c) of the Act,[5] to *include* the transportation of passengers who, pursuant to individual arrangements, buy individual tickets for the named types of pleasure travel, when sold by *brokers* receiving no commission for the sale, but to *exclude* that same transportation when sold by *carriers, agents*

---

[3] Title 49 U.S.C. Section 311.

[4] Title 5 U.SC.. Secs. 1001 and 1003. Appendix D hereto.

[5] Title 49 U.S.C. Secs. 307 and 308(c). Appendix D hereto.

of carriers, or *brokers accepting commissions from carriers;*

(b) Its construction of the term "broker", within the meaning of Section 203(a)(18),[6] to *include* one who acts exclusively in the capacity of agent of the purchaser of *passenger* transportation, but to *exclude* one who acts exclusively in the capacity of agent of the purchaser of *property* transportation.

4. The final question is whether the decision of the court below misconceived the nature of the legal issues presented to it and, as a result, failed to discharge its duties in reviewing such issues. The principal questions presented to it were legal questions as to whether the Interstate Commerce Commission had erroneously construed the statute and asserted a jurisdiction not embraced within its statutory powers. The decision of the court below indicates clearly that it decided the case upon what it considered to be the equities among the parties, and erroneously failed to determine independently the legal validity of the Commission's statutory interpretation and assertion of jurisdiction.

STATUTORY PROVISIONS INVOLVED

A number of provisions of the Interstate Commerce Act, Title 49 U.S.C., as well as the Administrative Procedure Act, Title 5 U.S.C., are here involved. The text of the principal pertinent provisions involved are set forth in Appendix D hereto. They include the following:

(a) The National Transportation Policy, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, which re-

[6] Title 49 U.S.C. Sec. 303(a)(18). Appendix D hereto.

quires, among other things, that the Interstate Commerce Act be so administered as to foster sound economic conditions in transportation and among the several carriers, and to develop and preserve an adequate national transportation system by highway.

(b) Section 206 (49 U.S.C. Sec. 306), which prohibits motor carrier operations other than pursuant to a certificate of public convenience and necessity;

(c) Section 207(a), which prohibits the issuance of a certificate for passenger operations over other than regular routes, except those authorizing special or charter operations;

(d) Section 208(a), which requires that the certificate specify the service to be rendered pursuant thereto;

(e) Section 208(c), which grants incidental statutory charter authority to each holder of a passenger motor carrier certificate to engage in charter service to any place in the United States;

(f) Section 211(a), which prohibits the sale, procurement, or arrangement for transportation without a broker's license, and prohibits the employment of a carrier not authorized to perform the type of transportation sold, procured, or arranged for;

(g) Section 211(b) which, among other things, authorizes the Commission to issue a brokerage license only where the proposed service will conform to the provisions of the Act, and the Commission's Regulations thereunder, and will be consistent with the public interest and the National Transportation Policy;

(h) Section 203(a)(18), which defines the term "broker";

(i) Section 217(d), which prohibits the transportation of passengers in the absence of published rates, fares, or charges;

(j) Section 2(c), of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1001), which defines the terms "rule" and "rule making";

(k) Section 4 of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1003), which prescribes agency procedures to be followed in rule-making proceedings;

(l) Section 10(e) of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1009), which prescribes, among other things, the duties of the reviewing court below.

STATEMENT OF THE CASE

The controversy in this case is not over facts, but over the law—namely, the statutory class rights *inter sese* of brokers and the several types of motor carriers with respect to the transportation of individually-ticketed passengers.

Tauck Tours, Inc. is engaged in the business of organizing and conducting tours by rail, motor bus, and steamship. Through public advertising, mailing lists, etc., it solicits individual persons to buy tickets for a particular scheduled trip of one of its "all-expense" tours, which includes transportation, hotel accommodations, meals, etc. The price of each patron's transportation is included in the over-all price for the ticket or membership covering his own individual accommodations. Where the transportation is by

railroad or steamship, Tauck purchases an individual carrier ticket for each patron.

In the proceeding below, before the Interstate Commerce Commission (*Tauck Tours, Inc., Extension —New York, N. Y.,* Docket No. MC-29488, Sub 3), Tauck sought a broker's license under Section 211(a) of the Motor Carrier Act,[7] covering a larger area than its present license. Although its passengers would be solicited and ticketed by Tauck individually, just as in the case of the rail or steamship portions of its tours, Tauck's proposal was to use charter-service for their motor bus transportation, instead of the individual-ticket type of transportation used for their travel by rail or water.

The controversy arose over the fact that the carriers employed in the past by Tauck, and which Tauck proposes to employ in the future, do not have authority to transport individually-ticketed passengers, but only charter-service authority, over the routes traversed. Appellants, as intervenors in opposition, took the position that the Act requires that Tauck use precisely the same type of transportation for their travel by bus as it uses for their travel by rail or steamship—that is, individual-ticket service by carriers authorized to transport individually-ticketed passengers over the routes—and that the statute does not permit the tariff rates applicable to individually-ticketed passengers to be defeated through the device of a charter.

In its first report,[8] Division 5 of the Commission

---

[7] Title 49 U.S.C. Section 311(a).

[8] Tauck Tours, Inc., Extension—New York, N. Y., (1949) 49 M.C.C. 491.

unanimously held that the principal issue was whether charter-service carriers used by Tauck, which have no authority to transport individually-ticketed passengers over the routes, may nevertheless transport this type of passenger when a broker such as Tauck sells the tickets. It held that if the statute be construed as permitting this to be done, regulation of regular-route passenger transportation would be nullified, because all regular-route carriers have nation-wide charter-service authority under the Act, and each carrier, through arrangements with a broker, would be enabled to transport individually-ticketed passengers everywhere throughout the United States, thereby making a mockery of regulation. It also held that the rights of a charter-service carrier cannot be enlarged, through the broker device, to include the transportation of individually-ticketed passengers, and that, under the Act, particularly Section 211(a),[9] any broker selling individual tickets must use a carrier authorized to carry individually-ticketed passengers over the route, under either a regular-route or special operations certificate. It granted Tauck a license to operate as a broker, provided the proposal of record be changed to comply with those principles.

Thereafter, upon reconsideration, the Division, although adopting and affirming the prior report, modified it to hold that Tauck or any other broker might, as an incident of its status as the holder of a broker's license, lawfully use charter-service carriers for all-expense tours, provided (1) the proposal of record be changed so that each ticket issued by the broker recite that the broker is the individual and collective agent of the passenger for his trans-

[9] 49 U.S.C. Sec. 311(a).

portation, and the broker's contract for the bus be in the name of the passengers, not the broker, (2) the broker not receive a commission from the carrier for the sale of the tickets.[10] Subsequently, upon reconsideration by a majority of the Commission, the two earlier reports were affirmed and adopted, and the authorization of the use of charter service by Tauck and other brokers, as an incident to holding a brokerage license, was extended to include individually-ticketed passengers traveling on the same sightseeing tour, ski trip, trip to attend an athletic, social, religious, educational, musical, or theatrical event, or similar trip.[11]

On judicial review the court below initially vacated the order of the Commission denying further hearing and reconsideration, and remanded the case to the Commission, because it had failed to issue an order implementing its 1952 report.[12] Thereafter, the Commission issued a final report and order reaffirming its prior findings and conclusions and expressly incorporating all of its prior reports.[13] Appellants again sought review in the court below, where the court held that its power to set aside the order was limited, and dismissed the complaint for want of equity.[14]

---

[10] Tauck Tours, Inc., Extension—New York, N. Y. (1950), 52 M.C.C. 373.

[11] Tauck Tours, Inc., Extension—New York, N. Y. (1952), 54 M.C.C. 291.

[12] National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc. v. United States of America and the Interstate Commerce Commission, (1954), 122 F. Supp. 876, Appendix C hereto.

[13] Tauck Tours, Inc., Extension—New York, N. Y. (1955), 63 M.C.C. 493.

[14] Appendix A.

QUESTIONS SUBSTANTIAL

The decision upon the questions presented in this appeal will determine whether the regulation of passenger motor carriers by the Interstate Commerce Commission will be largely nullified. It will determine whether some of the largest and most important categories of interstate motorbus passengers will continue to pay individual fares published in tariffs regulated by the Commission, or will be assessed individual fares which are subject only to the unregulated discretion of broker-intermediaries. It will determine whether these passengers will move primarily over irregular routes, in the guise of pseudo-charter service, or over regular routes, as prescribed by the Interstate Commerce Act. It will determine whether selection by a broker will to a large extent supplant the certificate provisions of the Act as a source of *carrier* authority to transport passengers by motor vehicle. To a very great extent, it will determine whether effective regulation and dependable bus service will cease.

The Act expressly grants every carrier with a regular-route certificate, regardless of how short the route may be, a statutory right to provide charter service *to every point and over every route in the United States.*[15] In addition, a large number of carriers hold certificates authorizing charter service over all routes throughout broad multi-state territories. The result is that hundreds of carriers are authorized to provide *charter* service over each certificated route of every regular-route passenger carrier.

---

[15] Title 49 U.S.C. Sec. 308(c).

Under the circumstances, the sole protection available to the certificated regular-route carrier, lies in the long-settled statutory interpretations and regulations holding that charter-service authority does *not* include authority to carry individually-ticketed passengers, but only bona fide groups, formed prior to the institution of negotiations for transportation, each of which contracts as a group-entity for the exclusive occupancy of the bus.[16]

When the Commission had before it the specific question whether the incidental statutory right of all regular-route carriers to provide nation-wide charter service could be construed to permit carriers to use that authority for the transportation of individually-ticketed passengers, it squarely held that the statute could *not* be construed to permit *any* such transportation without individual-ticket authority, and prescribed rules prohibiting same, declaring:[17]

> ". . . To permit carriers to deviate from their routes in offering a service to the public whereby the passengers may purchase individual tickets, and where, in many instances, the service would be performed over the route or routes of other carriers by motor vehicle, *would be tantamount to nullification of certificated rights.*" (Emphasis supplied.)

The decision specifically emphasized that the rules *prohibited* charter service to be used for individually-ticketed passengers traveling on "all-expense tours,

---

[16] *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401; *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25.

[17] Regulations, Special or Chartered Party Service (1941), 29 M.C.C. 25 at pages 35-36.

historic or sightseeing tours, excursions, and travel to special celebrations and events.'"[18]

The decision here appealed from now construes the same statute to authorize an entire class of expert professional promoters to concentrate upon and *use such transportation* for the exploitation of each of those specifically-named sources of individual-ticket pleasure travel, at individual fares which are not even subject to regulation. On its face, the latter authorization would appear to be more destructive of regulation and service than merely permitting the carriers themselves to do their own promotional work in competition with each other.

Actually, even in the reports incorporated in the final order in this case, the Commission itself has recognized that the intervention of a broker does not reduce the destructive effect:[19]

> **"The question is thus squarely presented, whether these carriers, which lack the authority to conduct in their own names operations of the type here considered (namely the transportation of groups made up of purchasers of individual tickets), may nevertheless conduct such operations merely by reason of the intervention of a broker and the making of a group contract with him. If so, then much of our attempt at regulation in the field of motor passenger carriers must largely be held for naught, at least insofar as concerns the regular-route carriers, which collectively form the backbone of the motor transportation of passengers."**

---

[18] Ibid., at pages 44-45.

[19] Tauck Tours, Inc.—Extension—New York, N. Y. (1949), 49 M.C.C. 491, 497.

To illustrate its point, the report continued:

> "For example, consider the case of a large mass-transportation carrier holding a certificate authorizing the transportation of passengers over a regular route between New York City and Jersey City, N. J., and operating several hundred busses, a great many of which are not in use over week ends or on holidays. It may not sell individual tickets in its own name except for travel between points on its authorized route. However, through the medium of a broker utilizing the charter device which applicant would have us approve, such a carrier could operate between New York and any point in the country, over any route, providing individual transportation sold by the broker at his New York City ticket office. The broker could advertise week-end service between such mass-movement points as New York and Atlantic City, N. J., and sell such transportation at any rate he chose, without publishing such rate, and the carrier could provide enough vehicles completely **to demoralize existing New York - Atlantic City regular - route services. Thus the carrier's certificate authorizing operation between New York and Jersey City loses its definitive or limiting character and the protection against unbridled competition, which the act is intended to afford to the existing New York-Atlantic City carriers, becomes a mockery.**" (Emphasis supplied.)

That finding was never reversed, but was *affirmed* by the subsequent reports. The latter, however, like the decision of the court below, construe the statute as authorizing the use of charter service for passengers purchasing individual tickets from brokers, under certain "conditions", all of which, incidentally, were

conceived by the Commission *after* the close of the record in this case.[20]

The *first* of those "conditions" is that the authorization is limited to individually-ticketed passengers traveling on all-expense tours, sightseeing trips, skiing trips, trips to attend athletic, social, educational, religious, musical, or theatrical events, or similar popular sources of individual-ticket travel—the very types of individual-ticket travel that were expressly held, in the *Regulations* case, *supra*, to be *prohibited* for charter-service authority and to require individual-ticket authority.

As the Commission has repeatedly recognized in its decisions, regular-route certificates include authority to transport individually-ticketed passengers traveling on such tours or any other special operations pleasure trips *over the certificated routes*, and regular scheduled service can be provided on a day-in-day-out basis during the unprofitable slack seasons only by virtue of the revenues which these carriers receive from such individual-ticket pleasure travel moving over their certificated routes in both regular scheduled service and special operations service, during the comparatively short peak periods. The first "condition" merely limits the use of charter-service authority to these vital sources of revenue supporting regular, dependable service. It does not lessen the importance or the substantiality of the destructive interpretation in any material degree.

---

[20] Although appellants promptly petitioned for further hearing to introduce evidence, among other things, showing that the conditions would not remove the dangers enumerated in the quoted excerpt from the 1949 report, those petitions were denied by the Commission.

The *second* "condition," the effect of which is that the tickets contain a small-print recitation that the broker is the agent of the ticket holder, not only is both false in fact and contrary to the legal effect of the purchase of the ticket, but is found by the Commission to be merely a formality, which changes neither the price paid, the accommodations received, the rights, the liabilities, the attractiveness nor any other circumstance or aspect of the passenger's travel. Even if the citation were read or understood by the passenger, it would not lessen the destructive effect of authorizing raids upon this important source of individual-ticket revenues of the authorized carriers.

The *final* "condition" is that the broker not receive a commission from the charter carrier for the sale of the tickets. Neither Tauck nor any other broker of record has ever received such a commission, even in the absence of this ruling. The large "spread" between the low standard charter rates and the aggregate standard individual fares of a bus load of passengers deprives such a requirement of any protective significance.

This appeal squarely presents the question whether those wholly ineffectual "conditions"—not one of which is mentioned or implied in any section of the statute—actually change the meaning of the statute, and remove the threat to effective regulation, the threat to the preservation of regular dependable bus service, and the frustration of the Congressional intent, all of which the Commission has heretofore consistently recognized to result from the same transaction in the absence of the "conditions."

These are important and vital national questions, deserving even of the time and consideration of the

Supreme Court for their proper determination. Since the very earliest days of regulation, appellants and most of the rest of the industry have been engaged in almost continuous litigation before the Commission in an effort to prevent *any* interpretation of *any* section of the Act which would permit the transportation of individually-ticketed passengers other than pursuant to an individual-ticket certificate issued upon specific proof of public convenience and necessity, including transactions where brokers sell individual tickets and use charter carriers. For the last 15 years, there has been in effect a Commission interpretation of the statute, as well as a specific regulation, which expressly prohibit the transportation, under charter-service authority, of *any* individually-ticketed passengers. For these reasons, most carriers possessing such authority have refrained heretofore from engaging in such transportation, either with or without a broker.

If the interpretation of the Act by the Commission in the case below should become final and effective, however, thereby irretrievably construing the statute to grant every broker in the nation—many of which have nation-wide authority—a class right to utilize the services of carriers without individual-ticket authority in raiding at will the principal peak-season pleasure travel of each certificated carrier, and to vest in virtually *every passenger motor carrier in the nation* the concomitant class right to provide a low-cost means of accomplishing such raids upon the authorized traffic of certificated carriers, a substantial amount of the service provided by the regular-route industry will be destroyed and its regulation in large measure nullified. Deprived of important revenues from traffic moving over its own routes during the *peak*

season, which are necessary to the preservation of its own regular service during the *slack* season, the regular route carrier would be forced to reduce or abandon the latter service, and to seek out a broker with which to exploit the peak-volume pleasure travel of some other carrier, which would, in turn, be forced to do likewise. Regulatory chaos and destruction of the basic *regular* service would closely follow.

The question presented by this appeal is the most vital question, from the standpoint of the regulation of the passenger motor carrier industry and the interests of the public which is dependent thereon, to arise in the 21 years of regulation.

The remaining questions involve (a) the power of the Commission to authorize operations which inherently result in violations of its own Regulations or to create exceptions to its Regulations without complying with the procedural requirements of the Administrative Procedure Act, (b) the legal invalidity of its construction of the term "charter" service and "broker" as used in the statute, and (c) the error of the District Court in deciding the case upon assumed equities among the parties, rather than independently determining the legal validity of the Commission's construction of the statute and assertion of jurisdiction. All are substantial and important questions of law.

ARGUMENT

1. THE COURT BELOW ERRED IN UPHOLDING THE COMMISSION'S CONSTRUCTION OF THE STATUTE AND ASSERTION OF JURISDICTION BASED THEREON.

(a) The Construction Violates the Prohibition of Section 211(a) of the Act

The Commission and the Court below properly hold that Section 211(a) of the Motor Carrier Act,[21] to have any meaning and to serve its purpose of preventing the "invasion of operating rights," must be construed to prohibit a broker from using a carrier not authorized to perform the particular type of transportation sold by the broker.[22] If the carrier "lacks the authority to conduct the operations in its own name," it may not conduct them "merely by reason of the intervention of a broker."[23] Thus, the test, under Section 211(a), of whether the broker may use a particular carrier is whether that carrier can provide the same service in its own name—i.e., when the *carrier* sells the tickets. In accordance with that construction of the meaning of Section 211(a), the decisions hold that the prohibition precludes the use by a broker of a carrier with only charter-service authority over the route, for the "bare" transportation of passengers to whom the broker has sold individual tickets, because such transportation is individual-ticket transportation, which the carrier has no authority to perform.[24]

---

[21] Title 49 U.S.C. Sec. 311(a).

[22] 54 M.C.C. 304, 143 F. Suppl. 695; Appendix A, pp. 11a-12a.

[23] 49 M.C.C. 497, specifically made a part of the final order.

[24] 52 M.C.C. 376.

In the construction under attack, however, the decisions hold that such use is *not* prohibited, where the passengers are interested in the same trip for pleasure "and not in mere transportation," even though, as they also hold, the same carrier is not authorized to carry those same passengers in the absence of the intervention of a broker—i.e., where the carrier sells the tickets.[25] On its face, that construction violates the meaning and purpose of Section 211(a).

(b) The Construction Destroys the Statutory Distinction Between Special and Charter Service

The court below erred in holding that the distinction between special and charter service is not an issue in the case at bar.[26] The crucial question under the Commission's own construction of Section 211(a) is whether the transportation sold by the broker comes within the authority of carriers authorized to provide charter service or the authority of carriers authorized to provide special service. The Motor Carrier Act authorizes only two classes of passenger transportation authority, other than regular-route authority, namely, authority to conduct special operations and authority to conduct charter service.[27] These are distinct and separate types of service, and require distinct and separate types of carrier authority.[28] The basic distinction under the statute,

---

[25] 52 M.C.C. 376-377.

[26] 143 F. Supp. 695, n. 7; Appendix A, pp. 6a-7a.

[27] Title 49 U.S.C. Sec. 307(a).

[28] *Fordham Bus Corp. Common Carrier Application*, (1941), 29 M.C.C. 293, 297; affirmed *Fordham Bus Corp.* v. *United States* (U.S.D.C.N.Y.), 41 F. Supp. 712; cited in *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406.

as consistently construed by the Commission in its decisions and charter regulations, as well as by the court, is that *special operations* service is any *individual-ticket* service, other than regular scheduled service, while *charter* service is the transportation of a single contractor (including a bona fide pre-formed passenger-group) which, pursuant to arrangements by the contractor as an entity, contracts as an entity for the exclusive use of the vehicle; it does not include the transportation of passengers who purchase individual tickets or make individual arrangements (i.e., negotiate individually) for their transportation.[29]

It should be emphasized that the distinction between the services authorized by special and charter carrier authority does not depend upon whether the transportation is "bare" or not, or whether it is for "pleasure" or not. The sole standard is whether each passenger arranges for or purchases his own transportation individually, or does a single contractor or pre-formed group-entity negotiate and contract for the hire of the entire bus. The same is true of the Regulations governing charter service,[30] which expressly *prohibit*, under the incidental charter-service authority, *all* transportation of the former, and *authorize all* transportation of the latter, regardless of whether the transportation is "bare" or whether it

---

[29] *Asbury Park-New York Transit Corp.* v. *Bingler Vacation Tours, Inc.* (1954), 62 M.C.C. 731 at pp. 739-741; affirmed *Bingler Vacation Tours, Inc.* v. *United States and the Interstate Commerce Commission* (D.C.N.J. 1955), 132 F. Supp. 793 and 350 U.S. 921; *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25; *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406, citing *Fordham Bus Corp., supra.*

[30] Regulations, Special or Chartered Party Service (1941), 29 M.C.C. 25.

is for "pleasure."[31] Many bona fide *individual-ticket* operations are *not* "bare" transportation, but are pleasure trips indistinguishable from those here involved, while many common bona fide *charter* operations *are* "bare" transportation and are *not* for pleasure.

As the Commission held in its decision in the leading case relating to the meaning of *special operations* authority, which was affirmed by the Supreme Court, the most common special operations certificates expressly authorize the transportation of passengers on all-expense, sightseeing, or pleasure tours, and the remainder authorize ski trips, race track operations, trips to summer or winter resorts, educational trips, trips to theatrical events or musical events, or some other individual-ticket travel on "group" pleasure trips.[32]

The decisions below apply the same standard as the regulations and the decisions cited above, where the arrangements are made with the carrier or its agent,[33] but apply a different standard—"bare" transportation versus a "trip for pleasure"—where each passenger individually makes his arrangements with and buys his tickets from a broker.[34] This was error. As seen,

---

[31] Contrary to the holding in the court below (Appendix A, pp. 7a-8a), the Regulations do not prohibit the *sale of individual tickets* by the carrier, but the *transportation pursuant to the charter authority* of passengers who make individual arrangements or buy individual tickets. 49 M.C.C. 25, 49.

[32] *Asbury Park-New York Transit Corp.* v. *Bingler Vacation Tours, Inc.* (1954), 62 M.C.C. 731, 738-9, affirmed *Bingler Vacation Tours, Inc. v. United States* (U.S.D.C.N.J. 1955), 132 F. Supp. 793, 350 U.S. 921.

[33] e.g. 52 M.C.C. 376-377.

[34] See e.g. Appendix A, pp. 14a-15a.

Section 211(a) requires that the carrier's authority determine whether the broker can use the carrier, and prohibits the determination of the *carrier's authority* by virtue of the broker's use of the carrier. Neither the Act nor the Regulations make any provision for or permit an inference that the type of authority is to vary with the identity of the seller.[35] The Commission cannot lawfully, as it has done here, apply different standards of what constitutes special service, rather than charter service, as between brokers and carriers, the only persons authorized by the Act to sell motor transportation.[36] Special service is special service, and not charter service, regardless of who sells the tickets.

The error of the Commission's construction is highlighted by the fact that the carrier which received "grandfather" *carrier* rights solely as a result of its "pre-grandfather" transportation of passengers traveling on the identical tours here involved — i.e., those of Tauck Tours, Inc. — was granted a *special operations* (i.e., individual-ticket) certificate, rather than a charter-service certificate.[37] If that transportation requires the *grant* of special operations authority, it requires the *possession* of special operations authority. The Commission's interpretation here would either disqualify that carrier to provide the specific transportation for which its certificate was

[35] Cf. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956), 350 U.S. 49: "The exemption is concerned with the stage of the processing, not with the person who does it."

[36] *United States* v. *Carolina Freight Carriers Corp.* (1941), 315 U.S. 475, 485-486.

[37] *August Bingler—Common Carrier Application* (1942), 41 M.C.C. 839 (not printed in full).

issued, or destroy the distinction between the two types of authority.

Within the past two years, the Commission has repeatedly confirmed that the transportation of passengers who buy individual tickets from tour brokers comes within the authorities of individual-ticket carriers, and has denied numerous applications for special operations tour certificates — *even those supported by Tauck and other similar brokers*—on the ground that the existing nation-wide tour transportation service, which the certificated *regular-route* carriers lawfully operate over their respective authorized routes at fares published in tariffs on file with the Commission, is extensively used by tour brokers and is adequate to meet the needs of purchasers of individual tickets *from tour brokers*, as well as from the carriers.[38] Those cases likewise confirm the right of the carriers with special operations certificates to carry the patrons of the brokers.

The transportation sold by Tauck and the other brokers to such individually-ticketed pleasure travelers is individual-ticket transportation, and requires either regular-route or special operations authority. It, therefore, cannot be performed under charter service authority, unless the statutory distinction between special operations authority and charter service authority, which this Court and the

---

[38] *Riverside Tours, Inc., Extension—Special Operations* (1955), 63 M.C.C. 387; *Rhode Island Bus Company, Extension—Special Operations* (1955), 63 M.C.C. 813 (not printed in full); *Monumental Motor Tours, Inc., Extension—Special Operations* (1955), 64 M.C.C. 814 (not printed in full); *The McMahon Transport Co.—Extension—Special Operations* (1952), 54 M.C.C. 813 (not printed in full).

Commission have heretofore held to exist,[39] is to be destroyed.

(c) The Commission's Construction Defeats the Congressional Intent and Effective Regulation

Under settled law, the Congressional intent must control the construction to be given the statute.[40] The Commission's construction, which the Court below upholds, would substantially thwart the intent of Congress:

> (a) That motor transportation (other than incidental charter service) be provided only pursuant to certificates and only after proof of public convenience and necessity for the specific service operated[41] and that the principal traffic move pursuant to regular-route authority,[42]—by creating a statutory class right to operate everywhere upon selection by a broker;
>
> (b) That charter service be merely *incidental,* —as evidenced by the statutory grant of appurtenant charter-service authority to all points in the nation to every holder of a regular-route certificate, regardless of how short the route might be,[43]—by construing that incidental right to include the right to carry the principal interstate traffic supporting year-round regular-

---

[39] *Crescent Express Lines, Inc.* v. *United States* (1943), 320 U.S. 401, 406.

[40] *United States* v. *American Trucking Associations, Inc.* (1940), 310 U.S. 534; *United States* v. *Rosenblum Truck Lines* (1942), 315 U.S. 50; *Gulf State Steel Company* v. *United States* (1932), 287 U.S. 32.

[41] Title 49 U.S.C. Sections 306 and 307.

[42] Title 49 U.S.C. Section 307(a).

[43] Ibid, Sec. 308(c).

route service—i.e., pleasure travel moving under individual tickets;

(c) That all individual fares paid by passengers be published in tariffs on file with and subject to regulation by the Interstate Commerce Commission,[44]—by construing the statute to permit these passengers to pay individual fares *fixed by brokers,* which fares are not even subject to regulation; and

(d) That a carrier's authority not be enlarged as a result of the intervention of a broker,[45]—by construing the statute to permit charter-service carriers to transport broker-originated pleasure travelers which they could not transport in the absence of a broker.

Moreover, in the National Transportation Policy,[46] Congress declares its intent to be that all sections of the Interstate Commerce Act be construed in such a manner as to foster and preserve a sound and economically stable passenger transportation industry, of which, as the Commission itself holds in the present case below,[47] the regular-route industry is the backbone. The effect of the Commission's construction of the statute is to authorize all of the hundreds of carriers possessing charter-service authority to compete for the principal individual-ticket pleasure-travel traffic of each certificated regular-route carrier, whenever any one of the many professional promoter-brokers determines that it would be profitable for him to exploit that traffic by promoting individual-

[44] Title 49 U.S.C. Sec. 317.

[45] Title 49 U.S.C. Sec. 311(a).

[46] Title 49 U.S.C. preceding Sections 1, 301, and 401.

[47] Title 49 U.S.C. 491, at p. 497.

ticket tours or other pleasure trips, under a course of business whereby the broker charges each passenger an unpublished individual fare in competition with the published fare of the regular-route carrier, and pays the otherwise unauthorized carrier the lower rates applicable to charter service. Such a construction cannot fail to substantially frustrate and defeat that intent.

The opinion of the court below dismisses these aspects of the Congressional intent as "abstract" because of Tauck's "valid business reasons" for wanting the statute to be so construed, and suggest that the exercise by others of the class right here in issue might be prohibited, if their "ends" were illegitimate.[48] "Reasons" and "ends" have nothing to do with whether that class right exists. If it is a statutory incident of Tauck's license, it is an incident of all licenses.

Contrary to the opinion below, there need be no express prohibition singling out such use by "tour brokers" *separate* from that for "brokers" generally. The issue is whether, by its general *class* prohibitions, the Act forbids *all* such use by *all* brokers, and whether the Commission erred in reading into those prohibitions *exceptions* which are neither mentioned nor implied therein.

The court's assumption that service of tour brokers is in jeopardy is without any supporting evidence of record in this proceeding. The sole effect upon the brokers of a reversal of the Commission's construction would be to require brokers to (a) use carriers authorized to transport individually-ticketed

[48] 143 F. Supp. at p. 696; Appendix A, p. 13a.

passengers and (b) pay the published individual-ticket fares of such carriers (less a commission), instead of paying the lower charter rate.[49] Neither the adequacy of the authorized existing transportation service nor the reasonableness of existing fares is a proper issue in determining the right of brokers to use a different type of carrier service. Other provisions of the Act[50] provide proper remedies for any deficiency which might exist therein. It is most significant, moreover, that in the cases where the issue *was* properly involved, Tauck's pre-regulation carrier received *special operations* (individual-ticket) authority—*not* charter service authority—by virtue of its operations for Tauck[51]—and the existing individual-ticket services for tour-passengers—including specifically the patrons of Tauck and the other brokers—were found to be substantially patronized and to be adequate to meet the needs of the passengers and the brokers.[52]

---

[49] Cf. *Acme Fast Freight, Inc., Common Carrier Application* (1938), 8 M.C.C. 211 and (1939), 17 M.C.C. 549, where same Act was construed to forbid freight forwarders from continuing their past practices with respect to (a) the use of contract carriers and (b) the type of rates paid to common carriers. The Supreme Court upheld the Commission's rulings in both respects. *Acme Fast Freight, Inc.* v. *United States* (1940), 309 U.S. 638, *United States* v. *Chicago Heights Trucking Co.* (1940), 310 U.S. 344.

[50] Title 49 U.S.C. Secs. 307, 317.

[51] *August Bingler, Common Carrier Application* (1942), 41 M.C.C. 839 (not printed in full).

[52] *Riverside Tours, Inc., Extension—Special Operations* (1955), 63 M.C.C. 387; *Rhode Island Bus Company, Extension—Special Operations* (1955), 63 M.C.C. 813 (not printed in full); *The McMahon Transport Co., Extension—Special Operations* (1952), 54 M.C.C. 813 (not printed in full); *Monumental Motor Tours, Inc., Extension—Special Operations* (1955), 64 M.C.C. 814 (not printed in full).

For the foregoing reasons, the Commission's construction of the statute is erroneous as a matter of law.

(d) The Commission Cannot Lawfully Issue a License Based Upon an Unlawful Proposal

The jurisdiction of the Commission to grant brokerage licenses is restricted to proposals which, among other requirements, "conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder," and are "consistent with the national transportation policy."[53] Since the proposal to use charter-service carriers for the transportation of individually-ticketed passengers is unlawful, and does not qualify under those limitations, the Commission had no jurisdiction to issue the license.

2. THE COURT BELOW ERRED IN UPHOLDING THE COMMISSION'S AUTHORIZATION OF OPERATIONS WHICH WILL NECESSARILY RESULT IN VIOLATIONS OF ITS REGULATIONS AND IN AMENDMENT OF THOSE REGULATIONS WITHOUT COMPLIANCE WITH PRESCRIBED RULE-MAKING PROCEDURES.

In a formal rule-making proceeding, conducted pursuant to the statute, the Commission prescribed regulations, which are still in effect, governing the conduct of charter service pursuant to the incidental right granted by Section 208(c) of the Act.[54] Those rules and the accompanying explanation by the Commission restrict such operations to the transportation of pre-organized groups, prohibit the transportation under that right of *any* passengers buying individual tickets or making individual arrangements for their transportation, and hold that appropriate special operations or regular-route authority is necessary for

---

[53] Title 49 U.S.C. Sec. 311(b).

[54] *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25.

such transportation. The report therein goes out of its way to list specifically by name, travel pursuant to individual tickets, on all-expense tours, sightseeing tours, trips to athletic or other special events, and other similar pleasure trips, as included within the prohibition.

The Commission in the case below holds that where passengers buy individual tickets or make individual arrangements with a broker, the broker may use carriers operating pursuant to that same charter service authority, provided the transportation involves those same types of pleasure travel, and provided further that the ticket recites that the broker is the agent of the passenger. If the latter authorization is not meaningless and futile, it necessarily and implicitly contemplates that the carrier may transport such individually-ticketed passengers pursuant to charter-service authority — a course of conduct expressly prohibited by the Regulations. It therefore violates

> ". . . the settled rule that a valid administrative regulation binds the administrator himself equally with others, United States ex rel. Accardi v. Shaughnessy, supra, 347 U.S. 260, 74 S. Ct. 499 (98 L. Ed. 681); Chapman v. Sheridan-Wyoming Co., 1950, 338 U.S. 621, 629, 70 S. Ct. 392, 94 L. Ed. 393; Bridges v. Wixon, 1945, 326 U.S. 135, 153, 65 S. Ct. 1443, 89 L. Ed. 2103; See Jefferies v. Olesen, D.C.S.D. Cal. 1954, 121 F. Supp. 463, 476, the same as though the provisions of the regulation were prescribed in terms by the statute. Atchison, T. & S. F. Ry. Co. v. Scarlett, 1937, 300 U.S. 471, 474, 57 S. Ct. 541, 81 L. Ed. 748. United States v. Finn, D.C.S.D. Cal., 127 F. Supp. 158, 165."[55]

---

[55] *School District 2 Fractional* v. *United States* (U.S.C.A., 6th Circuit 1956), 229 F. 2d 681, 686.

By the same token, the Commission's decision creates exceptions to the unrestricted direct prohibition specified in the Regulations, the effect of which is to curtail and revoke partially that prohibition, and to change entirely the criterion of charter service from that specified in the Regulations. Such substantial amendments of the Regulations constitute "rule-making," as defined in the Administrative Procedure Act.[56] Inasmuch as the Commission made no attempt to comply with the procedures prescribed by that Act,[57] the order is invalid.

3. THE COURT BELOW ERRED IN FAILING TO FIND THAT THE COMMISSION'S INTERPRETATIONS OF THE ACT ARE ERRONEOUS.

The order of the Commission as well as that of the court below, rests upon a ruling that individually-ticketed passengers who travel together and are interested in a tour for pleasure, rather than mere transportation, form a sufficiently cohesive group to qualify for lawful charter service, within the meaning of Section 207 and 208(c) of the Act,[58] where a broker sells the individual tickets. The decisions also hold, however, that the identical individually-ticketed passengers would not be a sufficiently cohesive group to qualify for lawful charter service, within the meaning of those same sections, if a carrier, an agent of a carrier, or a broker receiving a commission from a carrier sells the same tickets. There is no statutory warrant for thus applying a different or stricter test of lawful charter service for carriers than for brokers,

---

[56] Title 5 U.S.C. Sec. 1001, see Appendix D, p. 34a.

[57] Ibid, Sec. 1003, Appendix D, pp. 34a-35a.

[58] Title 49 U.S.C. 307 and 308(c).

and the latter construction is erroneous as a matter of law.[59] Moreover, in thus ascribing to the same statutory language two directly contrary meanings, the Commission's interpretation and the order based thereon are not only erroneous, but mutually self-refuting, arbitrary and capricious.

The definition of the term "broker" in Section 203(a)(18) embraces not only brokers of passenger transportation but also brokers of property transportation. The Commission's conclusion in the case below rests upon a ruling that, as a matter of law, the broker retains his status as a broker, within the meaning of that section, even though he represents exclusively the purchaser of the transportation. The Commission and the courts have consistently held that one who represents exclusively the purchaser of *property* transportation does *not* retain the status of a broker within the meaning of that Section.[60] The same statutory provision cannot be given two such diametrically opposite interpretations, based upon the application of different and conflicting standards. The Commission's interpretations of this section are erroneous, self-refuting, arbitrary and capricious.

---

[59] *United States* v. *Carolina Freight Carriers Corp.* (1941), 315 U.S. 475, 485-486.

[60] *Interstate Commerce Commission* v. *Chicago Food Manufacturers Pool Car Group, et al*, U.S.D.C.N.D. Ill. (1941), 39 F. Supp. 283; *Nevins Distributors, Inc., Broker Application* (1950), 51 M.C.C. 383; *Copex Company, Inc.* (1939), 14 M.C.C. 689; *Faulk Broker Application* (1938), 10 M.C.C. 145; *National Federation of Textiles, Broker Application* (1938), 10 M.C.C. 407.

4. THE COURT BELOW ERRED IN MISCONSTRUING AND FAILING TO DISCHARGE ITS DUTIES AS A REVIEWING COURT ON THE TYPE OF ISSUES PRESENTED TO IT.

The principal questions presented to the Court below were legal questions as to whether the Commission had erroneously construed the statute and asserted a jurisdiction not embraced within its statutory powers.

Under Section 10(e) of the Administrative Procedure Act,[61] the reviewing court has an affirmative duty to decide independently all relevant questions of law, interpret relevant statutory provisions, hold unlawful and set aside any agency findings or conclusions which are arbitrary, capricious, or otherwise not in accordance with law or which are in excess of the agency's statutory jurisdiction or authority, and any agency action which was without observance of the procedure required by law.

The opinion of the Court below shows that such independent determination was not made. At the very outset of its discussion of the crucial question, it ruled that its powers as a reviewing court are so limited that it may not overrule the Commission merely because the Court might reach a different conclusion, and thereafter confines its discussion primarily to considerations relating to assumed equities among the parties—such as the applicant's "reasons" for wanting to continue the questioned practice, its right to "complain with justice" at its disruption, and the wholly erroneous assumption that the practice had not been challenged earlier—disregarding completely the all-inclusive general prohibition in the statutory

[61] Title 5 U.S.C. Sec. 1009, text quoted in Appendix 35a-36a.

language and the Congressional intent.[62] In thus restricting its exercise of its powers of review, serious error is committed in the decision. On issues of statutory interpretation and Commission jurisdiction, such as here presented, it was the duty of the Court to determine independently whether it would actually reach the same conclusion as the Commission with respect thereto, and if, after such independent determination, it reached a contrary construction of the statute and the Commission's jurisdiction, to overrule the Commission. As the Supreme Court declared during the past year, in connection with a somewhat similar statutory interpretation by the Interstate Commerce Commission:[63]

> ". . . Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. See *Social Security Board* v. *Nierotko,* 327 U.S. 358."

In the *Nierotko* case, the Supreme Court, citing a long line of authorities, declared:[64]

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

The construction and interpretation of a statute is a judicial function, and if, upon independent determination, administrative interpretation and judicial construction conflict, the latter must prevail.[65] Although

---

[62] Appendix A, pp. 13a-14a.

[63] *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (1956), 351 U.S. 49.

[64] 327 U.S. 358 at p. 369.

[65] *Burnette* v. *Chicago Portrait Co.* (1931), 285 U.S. 1; *Woods* v. *Benson Hotel Corporation* (1949, ce8th), 177 F. 2d 543.

great weight ordinarily attaches to a construction consistently given by the administrative agency concerned with its administration, that weight cannot be given where, as here, constructions under attack have not been consistent and uniform, but are in direct conflict with its past constructions of the same statutory provisions, as well as the clear meaning of the statutory language itself.[66] In such instances, the cases cited hold that the administrative interpretation may be taken into account by the court only to the extent that it is supported by valid reason. And where, as here, the construction under attack is, on its face, so nearly identical with constructions which the Commission itself holds to nullify regulation, the administrative interpretation must be independently scrutinized with particular care to make certain that the same result will not occur.

In failing to make that independent determination, and in confining its consideration of the crucial statutory question largely to assumed equities among the parties, the Court below failed to discharge the duties of a reviewing court.

CONCLUSION

For the reasons set forth above, the questions presented by this appeal, which involve the determination of the rights, as a class, of all brokers of passenger motor transportation and all carriers of passenger motor transportation, and which involve statutory interpretations similar in every essential respect to interpretations which the Commission itself has held

---

[66] *United States* v. *Missouri Pacific Railroad Company* (1928), 278 U.S. 269; *Burnette* v. *Chicago Portrait Co.* (1931), 285 U.S. 1.

to threaten the provision of motor bus service and the nullification of regulation, are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

JAMES F. X. O'BRIEN
JACK R. TURNEY, JR.
EUGENE T. LIIPFERT
Attorneys for Appellants.

Dated: December 28, 1956

Proof of Service

I, Eugene T. Liipfert, attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of December, 1956, I served copies of the foregoing Statement as to Jurisdiction on the several parties, as follows:

On the United States, by mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Tauck Tours, Inc., intervening defendant, by mailing a copy in duly addressed envelope with postage prepaid to Francis V. Goggins, Esquire, 60 East 42nd Street, New York, New York;

On American Society of Travel Agents, intervening defendant, by mailing a copy thereof in duly addressed envelope with postage prepaid to Jerrold Scoutt, Jr., Esquire, 777 14th Street, N. W., Washington 5, D. C.;

On Thomas Cook & Son, Inc., Parker Tours, Inc., et al, intervening defendants by mailing copies thereof in duly addressed envelope with postage prepaid to S. Harrison Kahn, Esquire, Investment Building, 1511 K Street, N. W., Washington 5, D. C.

Eugene T. Liipfert
Attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 736-55

NATIONAL BUS TRAFFIC ASSOCIATION, INC., a corporation, and HUDSON TRANSIT LINES, INC., a corporation, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*

Before BIGGS, *Circuit Julge,* and MODARELLI and HARTSHORNE, *District Judges.*

Opinion

BIGGS, *Circuit Judge.*

This is an action to set aside an order[1] of the Interstate Commerce Commission in Docket No. MC-29488 (Sub. No. 3), Tauck Tours, Inc., Extension, New York, N. Y., granting Tauck an extension of its existing authority as a broker to conduct operations as described at a later point in this opinion. The plaintiffs are National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., who oppose the author-

[1] The identical proceedings, save those set out in 63 MCC 493, were before this court in Civil Action No. 168-53. The court, being then constituted as it is now, vacated the order of the Commission of November 3, 1952, denying reconsideration, to the end that the Commission might make a clear and definitive order implementing its report of April 21, 1952, 54 MCC 271. See 122 F. Supp. 876. The Commission thereupon reviewed the record, and made a further report and order on April 18, 1955, as appears from the report, just cited. This is the order reviewed in the case at bar.

ity granted to Tauck on several grounds. National Bus Traffic Association, Inc. represents 383 common carriers of passengers by motor vehicle, carriers who have the certificated authority to carry passengers who are individual ticket holders and, as an incident of such certification, also to serve as charter operators. Hudson Transit Lines, Inc. is a New Jersey corporation holding, to use the words of the complaint, "a certificate from the Interstate Commerce Commission authorizing operations with which operations authorized by the [Commission's] . . . order [in effect as to Tauck] would be directly competitive". It is a member of the National Bus Traffic Association, Inc. and like it participated in all of the proceedings before the Commission.

Tauck has operated all-expense travel tours usually by motor bus, to various points in the United States and Canada from the New York City areas since 1926. Before the present proceeding began Tauck had been licensed to engage as a broker of transportation by motor vehicle of passengers and their baggage pursuant to the "grandfather" clause of the Motor Carrier Act, 1935, now Section 209, Part II of the Interstate Commerce Act, 49 USCA Section 309, between New York City and Newark, New Jersey, as originating points on the one hand and destination points in a number of northeastern states and the District of Columbia on the other hand.[2] In the present proceeding the Commission extended Tauck's geographical authority as a broker to operate all-expense tours originating at New York, Newark and Philadelphia, to all points in the United States.[3]

---

[2] Tauck has also been authorized to act as a broker between Washington, D. C. and a number of northeastern states and the District of Columbia and between New York and Newark to points in Alabama, Mississippi and Louisiana.

[3] With the exceptions that no arrangements may be made for the transportation of any passenger from or to any point within 25 miles of New York City other than New York and Newark.

Tauck's tours are all-expense arrangements, so-called "package tours". Tauck sells individual "certificates of membership" in a specific tour to individual travelers, who ordinarily make arrangements either through Tauck's own officers or through travel bureaus or similar factors, which serve as selling agents for Tauck. The single price which the individual tourist pays for his certificate of membership covers almost all of the expenses of the trip, specifically including transportation, meals, and hotel accommodations. Tauck ordinarily uses motor buses as the means of transportation on its tours but railroad and water transportation are also employed occasionally. Only motor bus transportation is involved in the instant case. What the terms "charter" or "charter authority" mean is discussed at length hereinafter. It is sufficient to state at this point that Tauck's practice is to charter a motor bus from an operator holding a certificate of convenience and necessity from the Interstate Commerce Commission under Section 207 of the Interstate Commerce Act. See 49 USCA Section 307. Since Tauck plans its trips far in advance, it must also, at least on occasion, charter a motor vehicle before it or its agents have concluded the sale of certificates of membership to the general public for that particular trip.

In the hearing before the Commission, Tauck estimated that 90% of the bus transportation arranged by it was obtained from charter operators at a flat rate for the hire of the whole bus. Tauck does not own any motor vehicles and does not lease any. It does not operate the buses or other transportation facilities itself. The chauffeur or driver, employed by the bus company, controls the vehicle. In other words, the carrier has sole control of the bus or buses. Tauck does supply a tour director who looks after the comfort of the participants in the trip and is in general charge of accommodations and other similar arrangements. Tauck is one of the largest of a number of all-expense tour operators who have developed a substantial industry out of

this branch of the vacation and tourist business in the United States.

In order to understand the difficulties in which Tauck presently finds itself it is necessary to review some of the provisions of the Motor Carrier Act of 1935, Sections 201, *et seq.*, Part II of the Interstate Commerce Act. See 49 Stat. 543, 49 USCA Sections 301, *et seq.* Part II sets out a comprehensive scheme of regulation of motor carriers under the supervision of the Interstate Commerce Commission which is given broad power to grant certificates and licenses to motor carriers and to prohibit unregulated motor transportation of passengers and freight. The statutory scheme provides for licensing or certificating kinds of motor vehicle operators engaged in interestate commerce including common carriers, contract carriers, as well as motor transportation brokers. The various classifications are defined in Section 203, Part II, of the Act. 49 USCA Section 303.

The Commission has classified all-expense tour operators, including Tauck itself, as "brokers" under the Act.[4]

Tauck made its application to the Commission, the subject of the present proceedings, in 1948. In the administrative process before the Commission Tauck's application was considered a number of times with different results. The Examiner who heard the case was of the view, and so recommended, that Tauck's application should be denied on the ground that Tauck was not a broker but a common carrier. Division 5 of the Commission concluded that Tauck was acting as a broker and granted it the geographic extension it sought but expressly conditioned the grant by prohbiiting Tauck from chartering buses or other motor transportation. This opinion required Tauck to use

[4] See Cain Broker Application, 2 MCC 633 (1937); Tauck Tours, Inc. Contract Carrier Application, 10 MCC 361. In the second case cited, Tauck originally applied for a certificate of convenience and necessity as a contract carrier but the Commission classified it as a broker on the authority of the Cain case.

only motor carriers who had been authorized by the Commission to sell individual tickets to passengers. See 49 MCC 491 (1949).

Division 5 then granted Tauck's petition to reconsider and in a second opinion and order granted Tauck's extension application and permitted Tauck to use charter bus service provided the certificates of membership issued to the individual tourists "should clearly specify that purchase of a share or membership in the group by the individual shall amount to a designation of . . . [Tauck] as agent for the group members singly and collectively for the purpose of arranging such motor transportation." Division 5 also required that the contract for charter service "should be made in the name of the group by . . . [Tauck] as agent in order that there may be no question as to the carrier's direct responsibility as a carrier to the group members." See 52 MCC 373 (1951).

The matter than came before and was decided by the Commission[5] on April 21, 1952. In substance the Commission affirmed the order of Division 5 on reconsideration, allowing Tauck to use charter service, but made three conditions: "(1) provided the contract negotiated with the carrier furnishing the motor transportation is one between it and the group members collectively,[6] (2) provided the carrier is paid its full published charter fare, and (3) provided that . . . [Tauck] in arranging the motor transportation does not receive a commission from the carrier." See 54 MCC 291. The decision in the *Tauck* case has been followed by the Commission in disposing of a num-

---

[5] The Chairman and one Member were absent. Two Members dissented.

[6] It will be observed that though Division 5 required that a purchase of a share or membership in the group by the individual should ". . . amount to a designation of Tauck as agent for the group members, singly and collectively . . ." the Commission as a whole required only that the contract negotiated with the carrier be "one between it and the group members collectively . . ."

ber of subsequent applications by all-expense tour operators.

Most interstate bus operators certificated by the Commission are authorized to sell individual tickets to passengers, but some are not. The operators prohibited from selling individual tickets are restricted to hiring out their buses at a flat rate to groups interested in contracting for a bus or buses for a specific trip. The limited authority granted these operators is commonly referred to as "charter" authority.[7]

---

[7] The word "charter" appears twice in Part II of the Interstate Commerce Act. In both places it is coupled with the word "special". Section 207(a) provides for certificates of convenience and necessity to be issued to any qualified applicant therefor provided the Commission makes certain necessary findings, and also ". . . *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed terminals, except as such carriers may be authorized to engage in special or charter operations." Section 208(c) is discussed later in the text of this opinion, and authorizes any certificated common carrier to transport "special or chartered parties" to any place in the United States under such regulations as the Commission may provide. 49 USCA Section 308(c). The words "special" and "charter" are not defined in the Act itself.

In its regulations, the Commission has defined "special or chartered parties" as it occurs in 208(c) as follows: "The term 'special or chartered party,' as used in these regulations, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin." Ex parte No. MC-29, 29 MCC 25, 47-48; 49 C.F.R. Part 178.

"Special" or "charter operations" referred to in Section 207(a) are defined differently however. In Fordham Bus Corp. Common Carrier Application, 29 MCC 293, 297, the Commission said, "The terms 'charter' and 'special' operations as applied to motor carriers of passengers under part II of the Act are frequently confused and sometimes erroneously used as virtually synonymous. It is clear, however, that, properly employed, each identifies a particular and distinct type of service. Charter service contemplates

To be contrasted with the "charter" operators are common carriers who operate established interstate bus routes under certificates issued by the Commission and who are entitled to sell individual tickets to the passengers which they carry. As an incident of their regular route authority, Section 208(c), 49 USCA 308(c), of the Act grants common carriers operating routes with fixed termini the right to carry "special or chartered parties" from any point in the area regularly served by them to any point in the United States and return. See Peninsula Transit Corp. Common Carrier Application, 1 MCC 440 (1937). Under the rule-making authority granted to it by this section of the Act, the Commission has established regulations governing the transportation of "special or chartered parties". See 29 MCC 25, 47-48 (1949), 49 CFR Part 178. But it is noted that these regulations apply only to these special parties carried incidentally by regular route operators, and not to transportation by charter operators who do not have any regular route authority at all, or to motor transportation brokers. The regulations expressly prohibit regular route carriers from selling individual tickets to passengers car-

---

the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service generally on week-ends, holidays, or other special occasions to a number of passengers which the carrier itself has assembled into a travel group through its own sale to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier." The Commission's distinction in the Fordham Bus case was accepted by the three-judge District Court when the case was reviewed. See Fordham Bus Corporation v. United States, 41 F. Supp. 712, 717.

It is not necessary to discuss the difference between "charter" and "special" in order to decide the case at bar, however. The vital distinction in this case is between carriers authorized to sell individual tickets to passengers (regular route operators and special operators as defined in Fordham Bus) and carriers who may hire out a bus only to a group at a flate rate for the proposed trip (charter operators under either the regulations or Fordham Bus).

ried to any point beyond the authorized routes. See 29 MCC 25, 49.

The dispute here is not as to whether Tauck should have been granted the specified geographical extension it seeks—this is conceded—but whether in making use of the extension Tauck shall be allowed to use, as it has used in the past, chartered motor vehicles to transport its passengers, as appears from the reports of the Commission.

Section 203(a)(18), 49 USCA Section 303(a)(18), provides that "The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation . . . , or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

Section 211(a) of the Act, 49 USCA Section 311(a), states that "No person shall for compensation sell or offer for sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: *Provided, however,* That no such person shall engage in transportation subject to this part unless he holds a certificate or permit as provided in this part. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person [a broker] to employ any carrier by motor vehicle who or which is not the lawful holder of an *effective certificate or permit* issued as provided in this part: *And provided further.* That the provisions of this paragraph shall not apply

to any carrier holding a certificate or permit under the provisions of this part or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water."

What effect shall be given to Section 211 in the light of Section 203(a)(18) and of the whole Act, and, in particular, what meaning shall be ascribed to the phrase "effective certificate or permit" which we have italicized in the preceding paragraph?

The second *proviso* clause of Section 211(a) quoted above, excepts any bona fide agent of a motor carrier from the operation of the provisions of the section. The plaintiffs contend, however, that to be a "broker", as defined in Section 203(a)(18), one must act as an agent not only for the passenger but also for the carrier for the purchase and sale of transportation: otherwise one is no broker; that Tauck was constituted by condition "(1)," 54 MCC at p. 306, imposed by the Commission's order (i.e., ". . . the contract negotiated [by Tauck] with the carrier furnishing the motor transportation . . . [must be] one between it [the carrier]and the group members collectively . . .") as the exclusive agent for its patrons in contracting for transportation and that therefore it cannot be a "broker" within the definition of the Act. It follows, say the plaintiffs, since Tauck has been held not to be a "carrier", there is no way in which it can lawfully sell its certificates of membership.

Further, say the plaintiffs, even if Tauck can be deemed to be a "broker" under the first *proviso* clause of Section 211(a), it cannot employ any carrier by motor vehicle who does not have "an effective certificate or permit", and this means that if Tauck sells individual certificates of membership—mere "tickets"—then Tauck in procuring transportation for its patrons can employ only carriers who are licensed to sell individual tickets. Otherwise, it is argued,

any charter operator could break down the limitations so carefully placed on his operations by the Commission pursuant to the authority conferred by the Act for if such a carrier wished to reap the benefits from sales, expressly prohibited to him of individual tickets, he could do so by the easy subterfuge of engaging an obliging licensed broker to do the selling for him as his agent.

As to the first argument, that respecting the use of the terms "agent" and "broker" as employed in Sections 203(a)(18) and 211(a), we do not encounter great difficulty. It can be argued that the term "agent" in the definition section, Section 203(a)(18), must have been employed by Congress in two different senses, a substantial legal anomaly and one discussed by the Commission at some length.[8] But we think it unnecessary to resolve this question of interpretation for one who procures transportation for an individual or for a group may remain a broker whether or not he is also an agent for an individual or for a group, and for the carrier. We conclude that a travel agency such as Tauck may procure or engage transportation for an individual or for a group and still remain a "broker"

---

[8] The Commission attempts to avoid the apparent difficulty by interpreting the word "agent" in two different senses. See Cain Broker Application, 2 MCC 633 (1937). Cf. ICC v. Chicago Mfrs., 39 F. Supp. 283 (D.C.N.D. Ill. 1941). If we apprehend correctly the position of the Commission in the Cain case it construes the term "agent", first occurrence, as denoting a very close relationship to the carrier, practically that of an employee, but on its second occurrence, gives the word its usual meaning in the law of agency. Legislative history throws no light on the problem of construction.

The principal reason why the Act required motor transportation brokers to be licensed was because unscrupulous brokers were disrupting the industry by retaining financially irresponsible carriers. See Senate Document 152, 73rd Cong. 2d Sess. at p. 226 (Report of the Federal Coordinator of Transportation). Since irresponsible carriers are not certificated, Section 211(a) has prohibited disruptive transactions between brokers and carriers.

within the meaning of the Act. Cf. Copes Broker Application, 27 MCC 153 (1940).[9]

Directing our attention now to the plaintiffs' argument based in particular on Section 211(a), the "effective certificate or permit" provision, it should be noted that the effect of the Commission's condition "(1)," 54 MCC at p. 306, has been to cause Tauck to make use of a legend on its membership certificates by which the holder of the certificate, as a member of the collective tour group, has designated Tauck as agent for the purpose of arranging group motor transportation; that this, in the view of the Commission, had authorized Tauck to charter buses from carriers not certificated to sell individual transportation to passengers, thus rendering the certificates of such carriers "effective" within the meaning of Section 211(a).[10] The plaintiffs brand the legend as a "sham recitation"[11] designed to elude

---

[9] But see and compare such decisions as Interstate Commerce Commission v. Chicago Food Manufacturers Pool Car Group, 39 F. Supp. 283; Nevins Distributors, Inc., Broker Application, 51 MCC 383; Faulk Broker Application, 10 MCC 145; Mesler Broker Application, Docket No. M.C. 23867, decided November 16, 1939, cited with approval in 39 F. Supp. 283, 291; National Federation of Textiles, Inc., Broker Application, 10 MCC 407; Copex Company, Inc., Broker Application, 14 MCC 689.

[10] The Commission itself in the instant proceeding stated that in order for the "effective certificate or permit" phrase ". . . to have any real meaning [it] must require that the carrier performing the transportation service be not only the holder of a certificate or permit, but the holder of a certificate or permit authorizing it to perform the particular type of motor transportation for which such arrangements have been made by the broker."

The Commission went on to say: "Otherwise the prohibition, though offering protection to the motor carrier against the invasion by one not authorized to perform any interstate motor transportation, would not afford any guarantee against invasion of operating rights by any holder of a certificate or permit, however, remotely related that authority might be to the transportation for which arrangements have been made by the broker." See 54 MCC 304.

[11] See, for example, the petition of Hudson Transit Lines, Inc., as intervener in the proceedings before the Commission, dated January 6, 1955.

the "effective certificate or permit" language of Section 211(a). It must be conceded by the plaintiffs, however, that a preformed group of travelers—for example the members of a golf team or of an orchestra—may lawfully charter a bus for a tour. The Commission thought that Tauck's patrons, traveling and sightseeing together have a "community of interest" about the equivalent of that of a preformed group; that, therefore, if a collective contract for transportation be effected for its group by Tauck such a contract may be deemed to be a true "charter".[12]

But the substantial question before us is: is the Commission's position a tenable one? Does it have support in the record and in the law? Is it sufficiently rational to withstand the attack on the ground that the Commission has

---

[12] The question of whether the new form of contract changed any substantive contract rights was thoroughly covered in oral argument before this court. Before the ICC decision, Tauck's certificate of membership stated that Tauck undertakes "to act as agent only." Whether this meant as agent of the individual tourist or as agent of the carrier is not clear. The requirement added by the Commission is that ". . . the contract negotiated with the carrier is one between it and the group members collectively." On a conceptual level, it is now possible to argue that each traveler has now become individually responsible for the full charter rate which Tauck has agreed to pay the carrier for the hire of the bus, if Tauck itself does not pay. But if the new contract is approached from the more practical view of the intent of the parties and the Commission, it is highly doubtful that any such secondary liability was intended to be put upon the individual tourist.

This discussion is highly speculative and likely to remain so. Legal research has disclosed no reported case in which there was any attempt to hold individual travelers liable for the full charter price. There is at least one case involving a bus charter's liability for negligence, but it decided that the driver of the bus was an employee of the owner-charterer of the bus rather than of the chartering group. Goldwyn v. Coast City Coaches, Inc., 129 N.J.L. 521, 30 A. 2d 295 (1943). In the contract between the chartering group and the bus owner in that case, the bus owner retained control of the mechanical operation of the bus subject only to routing direction by the group. This is one of Tauck's arrangements also. Moreover, Tauck is bonded as the Commission pointed out in its final report, 63 MCC 493.

made a mere play on words, and has altered the law and its prior rulings by a syllogism? It is clear that the Commission has approached its problems with dexterity, and not with delight. Perhaps the legal management of our very complex modern transportation systems is the art of the possible. In any event our powers of review are limited.[13] We may not set aside the Commission's order simply because we might have reached a different conclusion on the same record. We must give due credit to the expertness of the Commission in the field Congress has confided to it.

In the light of the entire record we conclude the order of the Commission should not be set aside. The arguments of the plaintiffs, while appealing, necessarily possess an abstract quality under the instant circumstances for Tauck is not participating in a fictitious or sham device to grant "charter" operators, as defined by the Act, broader transportation authority than their present certificates allow them. Tauck has its own valid business reasons, which have nothing to do with extending the authority of charter operators, for having sought the extended certification granted it by the Commission. Tauck is an independent entrepreneur, supplying a useful service which it has developed for itself. Tauck could complain with justice if its traditional way of doing business is now disrupted because other transportation entrepreneurs who also are licensed as "brokers" are able to make use of arrangements similar to Tauck's for illegitimate ends of their own. Should charter carriers or licensed brokers embark upon such nefarious courses of conduct the powers of the Commission are ample to investigate their actions, cancel their

---

[13] In Acme Fast Freight v. United States, 116 F. Supp. 97, 99-100 (D. Del. 1953), it was said: "The scope of review by this court of orders of the Commission is limited. United States v. Pierce Auto Freight Lines, Inc., 1946, 327 U.S. 515; I.C.C. v. Union Pacific Railroad, 1912, 222 U.S. 541. Judicial review of Commission orders is now governed by the Administrative Procedure Act, 5 U.S.C.A. Sections 1001 et seq. See Riss & Co. v. United States, D.C.W.D. Mo., 96 F. Supp. 452, reversed 1951, 341 U.S. 907."

licenses or certifications, and, if necessary, make rules and regulations to correct possible abuses.

It must be borne in mind also that there is no express provision in the Motor Carrier Act, and nothing in its legislative history, to indicate that all-expense tour operators such as Tauck were to be prohibited from carrying on their established practices of chartering buses. And we also note that no question about tour operators' use of chartered buses was raised for thirteen years after the Motor Carrier Act became effective—indeed, we believe, not until the inception of the instant proceeding.[14] These are cogent considerations.

As to the form of words, the legend required by the Commission's order, we find it none too magical but we perceive no harm in requiring such a legend to be employed. It is not the words which are important but the circumstances which surround Tauck's tours. Though the individual membership certificates do entitle each individual Tauck patron to transportation and in this sense are "tickets," a good deal more than bare individual transportation is involved. The tour is attractive because it is a group adventure. Few people travel to look alone upon Niagara Falls or the Grand Canyon of the Colorado.

---

[14] The Commission stated: "Applicant and other all-expense tour conductors have been operating in the manner described for many years. In numerous decisions licenses have been granted, allowing the continuance or expansion of existing operations, or the institution of new operations of the same type. The method of operation was not challenged by any party or questioned by us prior to this proceeding, and over the years it has not produced the dire results now envisaged by interveners. On the contrary, we think all-expense tour conductors operating in the manner described have not only supplied a service needed by the traveling public but have developed substantial traffic beneficial to regular-route carriers. Now to close the door to the use by all-expense tour conductors of charter service whether supplied by regular-route carriers under authority of section 208(c) of the act or by carriers operating under certificates specifically authorizing charter service would be a disservice to the public and probably also to the regular-route carriers." See 54 MCC 291, 305.

Whether the group be formed by Tauck before or after the charter of the motor bus seems unimportant; nor does it seem a weighty circumstance that Tauck itself forms the group and not some outside individual, such, for example, as a ski instructor at a ski resort. The important thing is that the Tauck group is a cohesive whole interested in a tour for pleasure, and not in mere transportation.

Our conclusion is that Tauck is entitled to the extension which the Commission has granted it and may charter buses to carry its patrons as the Commission has ruled. We find that the Commission's determination is in the interest of the national transportation policy and we will not set aside the order complained of.

Other points raised by the plaintiffs do not require discussion for we find them to be without merit.

All petitions for intervention will be allowed.

The complaint will be dismissed for want of equity.

Findings of fact and conclusions of law are filed concurrently with this opinion. Rule 52(a), FRCP Title 28 USC.

HARTSHORNE, *J.* concurring.

The real truth of the matter is that while the sightseeing tour industry conducted in the manner used by Tauck was well known for many years before and after the enactment of the statute,[1] neither the statute nor its legislative history refers to that industry. The language of the statute, adopted with other situations in mind, should not lightly be construed to wipe out this long existing, wholesome industry. The purpose of the statute was of course to pro-

[1] Tauck Tours began operations in 1926; the Motor Carrier Act, 49 U.S.C. 301, et seq. was adopted in 1935; Tauck's operations were first attacked before the Commission in 1948.

tect both the public and the bus transportation industry throughout the country, but to prevent the various branches of the industry from inequitably interfering with each other. This group sightseeing industry so differs in nature from mere individual transportation, that the one does not inquitably interfere with the other. But when an all-expense paid sightseeing tour becomes in reality mere ordinary transportation, so as to affect inequitably regularly scheduled operations, the Commission and this Court in the past has not hesitated to effectuate the intent of the Act and prevent its violation. Bingler Vacation Tours, Inc. v. U. S. A., et als., 132 F. Supp. 793 (D.C. N.J. 1955).

Thus there is reason, in accordance with the intent of the statute, for the I.C.C. to set up conditions, carried out on the face of the contracts involved here, whereby the language of the statute can not be construed to wipe out this well established, wholesome industry. Since this action of the Commission therefore can not be found to be without reason, this Court must affirm the holding of the Commission, in accordance with well established principles.
July 30, 1956.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 736-55

NATIONAL BUS TRAFFIC ASSOCIATION, INC., and HUDSON TRANSIT LINES, INC., *Plaintiffs,*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Defendants.*

The above-entitled action having come on regularly for trial and the Court having duly considered the matter and being fully advised in the premises now makes the following:

Findings of Fact

(1) This is an action to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission, dated April 18, 1955, under Title 49, USCA, Sections 305(g) and 305(h), Title 28, USCA, Sections 1336, 1398, 2284, 2321-2325 and Title 5, USCA, Section 1009.

(2) Plaintiff, National Bus Traffic Association, Inc., is an incorporated association organized and existing under the laws of the State of Illinois, and plaintiff, Hudson Transit Lines, Inc., a motor carrier of passengers, is a corporation organized and existing under the laws of the State of New Jersey.

(3) The order in suit was entered in a proceeding conducted by the Interstate Commerce Commission under Title 49, USCA, Section 311, upon application filed by Tauck Tours, Inc., on or about February 3, 1948.

(4) Tauck Tours, Inc., and its predecessor-in-interest, had been engaged for upwards of ten years prior to the enactment of the Motor Carrier Act of 1935 (now Title 49, USCA, Sections 301 et seq.), in operating personally conducted all-expense group sight-seeing and pleasure tours; that as part of such operations it had procured and provided the exclusive use of motor vehicles for its tour groups by charter arrangements with the owners and operators of such vehicles.

(5) That on or about December 2, 1935, Tauck Tours, Inc., filed a timely application, in accordance with the requirements of the Motor Carrier Act of 1935, with the Interstate Commerce Commission seeking authority to continue its operations; and following a hearing upon said application, the Interstate Commerce Commission found and determined that the operations of Tauck Tours, Inc., were those of a broker as defined in Title 49 USCA, Section 303(a)(18) and issued a license authorizing the continuance of such operations in certain specified states.

(6) That on or about February 3, 1948, Tauck Tours, Inc., filed an application with the Interstate Commerce Commission under Title 49, USCA, Section 311, seeking an extension of its then existing authority as a broker so as to conduct operations between all points and places in the United States; that the application was assigned Docket No. MC-29488, Sub. No. 3 and was captioned "TAUCK TOURS, INC., EXTENTION—NEW YORK, N. Y."

(7) That the application was assigned for hearing before an Examiner of the Interstate Commerce Commission; that at the hearing, held May 14, 1948, Tauck Tours, Inc., appeared and presented oral testimony and documentary evidence in support of the application; that plaintiff, Hudson Transit Lines, Inc., and other motor carriers of passengers intervened at the hearing in opposition to the application, but offered no evidence.

(8) That on or about August 27, 1948, the Interstate Commerce Commission served upon the parties to the proceeding, a Report and Order in which the Examiner recommended that the application be denied.

(9) That thereafter, Tauck Tours, Inc., filed exceptions to the Report and Order recommended by the Examiner; that on or about January 7, 1949, the Interstate Commerce Commission entered an Order permitting plaintiff, National Bus Traffic Association, Inc., to intervene as a party in the proceeding.

(10) That on or about August 4, 1949, the Interstate Commerce Commission, Division 5, following oral argument, issued its Report and Order, which granted the application of Tauck Tours, Inc., for a broker's license, but restricted the services of the applicant to arrangements either with motor common carriers authorized to engage in operations as carriers of passengers over regular routes or with carriers of passengers authorized to engage in "special operations."

(11) That thereafter, Tauck Tours, Inc., Thos. Cook & Son, Incorporated, other brokers and American Society of Travel Agents, Inc., which had been granted leave to intervene as parties to the proceeding, petitioned the Interstate Commerce Commission to reopen the proceeding and for reconsideration of the Report and Order of Division 5 of August 4, 1949.

(12) That on January 26, 1951, the Interstate Commerce Commission, Division 5, (one Commissioner dissenting) issued a Report and Order on Reconsideration, which affirmed the findings of the Report and Order of August 4, 1949, but found and concluded that the groups assembled by Tauck Tours, Inc., were groups for whom Tauck Tours, Inc., might properly procure the exclusive use of motor vehicles by charter arrangements with motor carriers of passengers specifically authorized to engage

in charter operations and with motor carriers of passengers who exercise "incidental rights" under Title 49, USCA, Section 308(c); that such arrangements would be in the public interest; and that they should be conducted under terms and conditions specified in the Report.

(13) That thereafter, plaintiffs herein and others petitioned the Interstate Commerce Commission for Reconsideration of the Report and Order of January 26, 1951.

(14) That on April 21, 1952, following oral argument, the Interstate Commerce Commission (two Commissioners dissenting, two Commissioners not participating) issued a Report on Oral Argument, which affirmed the findings, conclusions and determinations of the Report and Order of January 26, 1951.

(15) That thereafter, plaintiffs and others petitioned the Interstate Commerce Commission for Reconsideration of the Report on Oral Argument of April 21, 1952, and plaintiff, National Bus Traffic Association, Inc., petitioned the Interstate Commerce Commission for further hearing in the proceedings.

(16) That on November 3, 1952, the Interstate Commerce Commission entered its Order denying all of the petitions.

(17) That plaintiffs instituted action in this Court against the United States of America and the Interstate Commerce Commission in Civil Action Docket No. 168-53.

(18) That, after Hearing, this Court by Opinion and Order dated August 2, 1954, vacated and set aside the Order of the Interstate Commerce Commission of November 3, 1952, and remanded the Record to the Commission to enter an Order implementing its Report of April 21, 1952, and for such other action as it might deem appropriate.

(19) That plaintiffs filed petitions with the Interstate Commerce Commission on December 27, 1954, and January 7, 1955, respectively.

(20) That the Interstate Commerce Commission reopened the proceeding on its own motion and, on April 18, 1955, issued its Report on Reconsideration and entered an Order which incorporated the Report and the Reports of August 4, 1949, January 26, 1951, and April 21, 1952, and denied the petitions of the plaintiffs mentioned in paragraph (19) hereof.

(21) That plaintiffs thereafter instituted the present action in this Court referred to in paragraph (1) above.

Conclusions of Law

I.

The Court has jurisdiction of this action under Title 49, USCA, Sections 305(g) and 305(h), Title 28, USCA, Sections 1136, 1398, 2284, 2321-2325, and Title 5, USCA, Section 1009.

II.

The Interstate Commerce Commission had jurisdiction to enter the Report and Order in suit under Title 49, USCA, Section 311.

III.

The Interstate Commerce Commission made the ultimate jurisdictional findings required by Title 49, USCA, Section 311, that Tauck Tours, Inc., was fit, willing and able properly to perform the service proposed and to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Interstate Commerce Commission thereunder, and that the proposed service, to the extent to be authorized by the license is, or will be consistent with the public interest and the national transportation policy declared in the Act.

IV.

The Report and Order of the Interstate Commerce Commission in suit are supported by adequate findings based on substantial evidence in the record as a whole.

V.

The Report and Order of the Interstate Commerce Commission in suit are neither arbitrary nor capricious, nor were they based on a mistake of law or misapplication of proper statutory standards.

VI.

There are rational bases for the conclusions and determinations of the Interstate Commerce Commission.

VII.

The plaintiff are not entitled to the relief sought and the complaint should be dismissed.

Dated this 30th day of July, 1956.

FOR THE COURT

/s/ JOHN BIGGS JR.
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 168-53

NATIONAL BUS TRAFFIC ASSOCIATION, INC., a corporation, and HUDSON TRANSIT LINES, INC., a corporation, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before BIGGS, *Circuit Judge*, and MODARELLI and HARTSHORNE, *District Judges*.

Opinion

BIGGS, *Circuit Judge*.

This is an action to set aside—to employ the words of the third prayer of the complaint—". . . the orders of the Interstate Commerce Commission of January 26, 1951, and April 21, 1952 and November 3, 1952 . . .". The prayer is erroneous. The Interstate Commerce Commission entered no order of April 21, 1952.

In view of our present disposition of the proceeding it is unnecessary now to go into detail as to the operative facts. It is sufficient to say here that on August 4, 1949, Division 5 of the Interstate Commerce Commission modified the recommendations of Examiner Dahan and filed a report and order in respect to the status of Tauck Tours, Inc. which had sought an extension of authority under its broker's license. Thereafter, on reconsideration, on January 26, 1951, Division 5 filed a report and order modifying its previous report and order of August 4, 1949. The proceedings then went to the full Commission

for consideration. On April 21, 1952, the Commission filed its report, modifying in certain material respects the *conclusions* expressed in the reports of Division 5. But the Commission entered no order, stating as a fact, "No further order is necessary."

On November 3, 1952, the Commission entered an order denying petitions for reconsideration filed by the plaintiffs and by a number of interveners ". . . for the reason that the report of April 21, 1952 . . . was decided only after extensive oral argument and long consideration, and sufficient cause (has) not . . . been shown to warrant further consideration, further hearing, or oral arguments."

The report of the full Commission of April 21, 1952, modified the reports of Division 5 as follows. Division 5 in its report and by its order of January 26, 1951, imposed as a condition upon granting Tauck an extension of its broker's license that the certificates of membership accepted by Tauck's tour patrons must authorize Tauck ". . . as agent for the group members, singly and collectively for the purpose of arranging . . . motor transportation . . .". The report of the full Commission on the very important issue of agency, required only that the contract negotiated by Tauck with the carrier should be ". . . one between it and the group members collectively . . .". The full Commission in its report stated that it would also require as further conditions to extend the license that Tauck should pay each carrier its full published charter fare and would also require that Tauck ". . . in arranging motor transportation . . . (should) not receive a commission from the carrier . . .". Despite these changes the Commission made no order.

It is apparent, therefore, that this court, after extended oral arguments, after the filing of briefs and summaries and requests for findings of fact and conclusions of law by the parties, has been considering a "case" *seemingly* presented by the reports and orders of Division 5 of August 4, 1949 and January 26, 1951, and the report of

the full Commission of April 21, 1952. Such a "case" cannot be adjudicated on the instant record.

We lack the jurisdiction, i.e., the power, to do so. Our jurisdiction is only to review *orders* of the Interstate Commerce Commission. Section 2321 of Title 28, USC, provides: "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any *order** of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter." Section 1336 provides, ". . . the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any *order* of the Interstate Commerce Commission." Section 1938, the venue section, provides that, ". . . any civil action to enforce, suspend or set aside in whole or in part an *order* of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action." See also the use of the word "order" in Sections 2284(2) and 2284(5) of Title 28. See in particular Section 305(g), Title 49 USCA, Part II of the Interstate Commerce Act, which provides in pertinent part: "Any final *order* made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title . . .". Note also the use of the phrase "negative order" in the proviso of subsection (g).

We do not possess the jurisdiction to review conclusions reached or expressed simply in reports of the Commission. As we have indicated, one of the vital issues presented by the present controversy is the status of Tauck as broker and agent. The amendments, heretofore referred to, particularly in respect to the status of Tauck as agent, intended to be effected by the full Commission's report of April 21, 1952, present the "case" to which the parties

* Emphasis added throughout this opinion.

and the members of this court have directed their attention and their energies. We cannot now adjudicate that controversy for the Commission has not entered any definitive order implementing its opinion of April 21, 1952. The latest order of the Commission which goes to the merits of the controversy is that by Division 5 of January 26, 1951. To base the decision of this court upon that order would be a futility for we are all aware that the report of the full Commission of April 21, 1952 contains the meat of the controversy.

We do, however, possess the power to vacate the order of the Commission of November 3, 1952, denying reconsideration, to the end that the Commission may make a clear and definitive order implementing its report of April 21, 1952. If upon remand the Commission makes such an order a new suit and a new complaint may, of course, be filed. If a new suit be started in the court below the present writer will designate as members of that court the same judges who have sat in the instant proceedings. As presently advised no additional record, arguments, briefs, or requests by the parties would seem to be necessary.

Accordingly the order of the Commission of November 3, 1952 will be vacated and set aside and the record remanded to the Commission for such action as is suggested in this opinion or for such other action as the facts and the law may require and the Commission shall deem to be necessary.

To the end that the petitioners for intervention may take part in the proceedings in the Supreme Court in case we are in error in our decision in the instant case all the petitions for intervention will be granted. We also will deny the motion to strike from the record "Exhibit No. D-1 for Identification". This is the "Certificate of Membership" presently used by Tauck. It will be made part of the record in the instant case.

August 2, 1954.

APPENDIX D

Text of Pertinent Statutory Provisions

A. Provisions of the Interstate Commerce Act

1. National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901 and 1001:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

2. Section 303 (a) (18) (49 U.S.C. 303):

> "The term 'broker' means any person not included in the term 'motor carrier' and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation."

3. Section 206 (49 U.S.C. Sec. 306):

> "(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor

vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations . . ."

4. Section 207 (a) (49 U.S.C. Sec. 307):

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

5. Section 208 (a) (49 U.S.C. 308):

"Any certificate issued under sections 206 and 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, . . ."

6. Section 208 (c) (49 U.S.C. 308):

"Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed."

7. Section 211 (a) (49 U.S.C. 311):

"No person shall for compensation sell or offer for sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides procures, contracts, or arranges for such transportation, unless such person hold a broker's license issued by the Commission to engage in such transactions; *Provided, however,* That no such person shall engage in transportation subject to this part unless he holds a certificate or permit as provided in this part. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this part: *And Provided Further,* That the provisions of this paragraph shall not apply to any carrier holding a certificate or a permit under the provisions of this part or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water."

8. Section 211 (b) (49 U.S.C. 311 (b)):

"A brokerage license shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform

to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is, or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. . . ."

9. Section 217 (d) (49 U.S.C. 317):

"No common carrier by motor vehicle, unless otherwise provided by this part, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part."

B Provisions of the Administrative Procedure Act

1. Section 2 (c) (5 U.S.C. Sec. 1001):

"Rule and Rule Making.—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment or repeal of a rule."

2. Section 4 (5 U.S.C. Sec. 1003):

"Except to the extent that there is involved (1) any military, naval or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either per-

sonally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency or organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

3. Administrative Procedure Act, Section 10 (e) (5 U.S.C. Section 1009):

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

FILED
JAN 24 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC.,
Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

ROBERT S. BUTTLES,
Attorney for Tauck Tours, Inc.,
120 Broadway,
New York, N. Y.

IN THE

Supreme Court of the United States

October Term, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC.,

Appellants,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Tauck Tours, Inc., an intervening defendant in the Court below, moves, pursuant to Rule 16(c) of the Rules of this Court, to affirm the judgment of the District Court on the ground that the questions presented in appellants' Statement of Jurisdiction are so unsubstantial as not to warrant further argument.

Statement

This is a direct appeal from a judgment entered August 17, 1956 by a District Court of three Judges specially constituted under Title 28 U. S. C. Secs. 2284 and 2325; the judgment dismissed appellants' complaint which sought to set aside, annul and enjoin an Order of the Interstate Commerce Commission dated April 18, 1955.

The Order of the Commission finally determined a proceeding conducted under Sec. 211(b) of the Interstate Commerce Act (Title 49 U. S. C. 311(b)) in Commission Docket No. MC-29488 (Sub. No. 3), under the caption "Tauck Tours, Inc., Extension, New York, N. Y.". In 1948, Tauck, which had been licensed by the Commission to arrange as a broker for the transportation of passengers by motor vehicle in certain specified states, applied for a license authorizing the geographical extension of its operations to all points in the United States. The administrative proceedings before the Commission are set forth in complete detail in the Findings of Fact of the District Court (Statement of Jurisdiction, Appendix B, 17a-21a). The Order of the Commission directed the issuance of the license sought in the application, with a minor amendment not material here. The District Court, in a carefully considered opinion, Hartshorne, *D. J.*, concurring in a separate opinion, unanimously upheld the determination of the Commission.

Argument

Appellants, in seeking review by this Court, contend that there are substantial questions of law requiring consideration. In general terms they claim that both the Commission and the Court below misconstrued the applicable provisions of the Interstate Commerce Act; they insist that the Commission, in reaffirming the right of a broker of all expense tours to arrange for charter transportation by motor vehicle, did not comply with the provisions of the Administrative Procedure Act (Title 5 U. S. C.); they argue that the case was decided on the "equities" and that the Court failed to discharge its functions as a reviewing tribunal. But, when appellants' contentions are reduced to simple terms, it is apparent that there is but one issue of law in the case: Does the Interstate Commerce Act prohibit the procurement of charter transportation by brokers

such as Tauck? The Commission and the Court below properly answered that question in the negative.

The interstate transportation of tourists or sightseeing groups existed for many years prior to the passage of the Motor Carrier Act of 1935 (now Part II, Interstate Commerce Act). In some instances these operations were conducted by motor carriers which not only assembled groups by individual arrangements, but which also transported the groups in their own equipment. The Commission later found that these activities differed from conventional regular route transportation and determined that they were "special operations" under the proviso of Sec. 207(a) of the Act. Cf. Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M. C. C. 521. On the other hand, there were a number of organizations, such as Tauck, which assembled tourist groups and then contracted for their exclusive transportation in motor equipment owned and operated by others. The Commission determined that such operations were those of a "broker", as that term is defined in Sec. 203(a)(18) of the Act, and issued licenses authorizing their continuation. Cf. Cain, Broker Application, 2 M. C. C. 633, and the Report of the Commission (10 M. C. C. 361) on the Tauck "grandfather" application, in which Tauck, uncertain of its status under the Act, requested the grant of appropriate authority.

The obvious purpose of the Act was to regulate all segments of the motor transportation industry and to prohibit certain practices which the Congress deemed inconsistent with a sound transportation policy. An extensive legislative history was compiled in the reports and hearings, preliminary to the enactment of the Statute. But the legislative history may be searched in vain for any indication of Congressional intent to illegalize existing arrangements for the transportation of the tourist groups. And, nothing in the language of the Statute, fairly construed,

can be said to proscribe such arrangements. The Commission in its later Reports so interpreted the Act. True, a reviewing Court is not bound by the Commission's interpretations of law. Both opinions below, however, clearly indicate that the Court independently construed the Act and rejected appellants' contention that the determination of the Commission violated the basic intendment thereof.

Biggs, *C. J.*, writing for the Court, said:

> "It must be borne in mind also that there is no express provision in the Motor Carrier Act, and nothing in its legislative history, to indicate that all-expense tour operators such as Tauck were to be prohibited from carrying on their established practices of chartering buses." (143 Fed. Supp. at 696)

Hartshorne, *D. J.*, concurring, noted:

> "The real truth of the matter is that while the sightseeing tour industry conducted in the manner used by Tauck was well known for many years before and after the enactment of the statute, neither the statute nor its legislative history refers to that industry. The language of the statute, adopted with other situations in mind, should not lightly be construed to wipe out this long existing, wholesome industry." (143 Fed. Supp., at 697)

The Commission and the Court found that the transportation of tour broker groups is performed by carriers specifically authorized to engage in "charter operations" under Sec. 207(a) of the Act and by regular route carriers exercising the so-called "incidental right" of transporting "special or chartered parties" under Sec. 208(c). The Court, however, noted that the word "charter" was not defined in the Act; nor was any definition given therein to the phrase "special or chartered parties". In the absence of statutory guides, recourse may be had to the dictum of this Court in *Maher* v. *United States*, 307 U. S. 148, 155:

> "The recognized practices of an industry give life to the dead words of a statute dealing with it."

The transportation of a group of individuals traveling together for a common purpose and enjoying the exclusive use of a motor coach is an incident of everyday life. As noted above, this form of transportation is a characteristic feature of the all expense tours conducted by Tauck and other brokers. When such transportation is performed by a motor carrier which plays no part in the organizing or assembly of a group, it is commonly described in trade parlance as "charter" service. Industry practices were accorded recognition in Commission decisions construing the word. In *Fordham Bus Corp., Common Carrier Application,* 29 M. C. C. 293, 297, it said:

> "Charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour."

And, in the exercise of its rule making power under Sec. 208(c), the Commission defined the phrase "special or chartered parties" used therein as follows:

> "The term 'special or chartered party' as used in these regulations, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle in accordance with the carrier's tariff, lawfully on file with the Commission, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin." (Rule II, Regulations, Special or Chartered Party Service, 29 M. C. C. 25, 47-48)

When the respective definitions are read in conjunction, it is obvious that they are synonymous and connote group service.

In discussing appellants' contention that tour groups individually assembled by brokers may be transported only by regular route carriers and carriers engaging in "special operations," the Court below observed:

> "It must be conceded by the plaintiffs, however, that a preformed group of travelers—for example the members of a golf team or of an orchestra—may lawfully charter a bus for a tour." (143 Fed. Supp. at 695)

And, it may be asked, is there any rational basis of distinguishing, as appellants attempt, between "preformed groups" and broker tourist groups? The Court below felt there was none:

> "Though the individual membership certificates do entitle each individual Tauck patron to transportation and in this sense are 'tickets,' a good deal more than bare individual transportation is involved. The tour is attractive because it is a group adventure. Few people travel to look alone upon Niagara Falls or the Grand Canyon of the Colorado. Whether the group be formed by Tauck before or after the charter of the motor bus seems unimportant; nor does it seem a weighty circumstance that Tauck itself forms the group and not some outside individual, such, for example, as a ski instructor at a ski resort. The important thing is that the Tauck group is a cohesive whole interested in a tour for pleasure, and not in mere transportation." (143 Fed. Supp., at 696-697)

Appellants insist, nevertheless, that the conclusion of the Commission that tourist groups are entitled to the continued use of charter service is in direct conflict with the Regulations, supra; they repeatedly refer to the prohibition therein (Rule VI, 29 M. C. C. 25, 49) of the transportation of passengers with whom individual arrangements have been made; ergo, they argue there has been a violation of the Administrative Procedure Act. In refer-

ring to the prohibition, however, appellants conveniently ignore or avoid the qualifying exception therein in favor of a member of a "special or chartered party", as defined in Rule II, supra. The relevant sections of Rule VI provide:

> "No common carrier of passengers by motor vehicle subject to these rules shall transport passengers to whom individual tickets have been sold or with whom individual transportation arrangements have been made (1) from or to any point or points except those upon its regular route or routes or authorized to be served as off route points, or (2) over any route or routes other than those so authorized to be served by such carrier. The transportation of any passengers under any such arrangements by any such carrier to or from any point or points not on the regular route or routes of such carrier or to or from any point not authorized to be served as an off route point, or over any route or routes other than those authorized to be served by such carrier, EXCEPT AS A MEMBER OF A SPECIAL OR CHARTERED PARTY AS HEREIN DEFINED, is not authorized and is hereby forbidden. * * * " (Emphasis supplied)

Accordingly, if, as the Commission and the Court determined, members of a tour group assembled by brokers are within the contemplation of the groups excepted in Rule VI, and no valid reason exists for denying them that status, appellants' claim that the Administrative Procedure Act was violated is without foundation.

Apart from other considerations, affirmance of the judgment below is warranted by prior decisions of this Court construing the Motor Carrier Act. The Court has held that the basic intendment of the Statute is the preservation of "substantial parity" between future operations and those conducted prior to the Act. *Alton Railroad Co.* v. *United States,* 315 U. S. 15; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475; *Nobel* v. *United States,* 319 U. S. 88. To the tour broker, substantial parity

means the continued right to charter motor transportation consistent with the declaration in the National Transportation Policy (Title 49 U. S. C., preceding Sec. 301) that the Act be administered "as to recognize and preserve the inherent advantages" of that form of transportation.

Conclusion

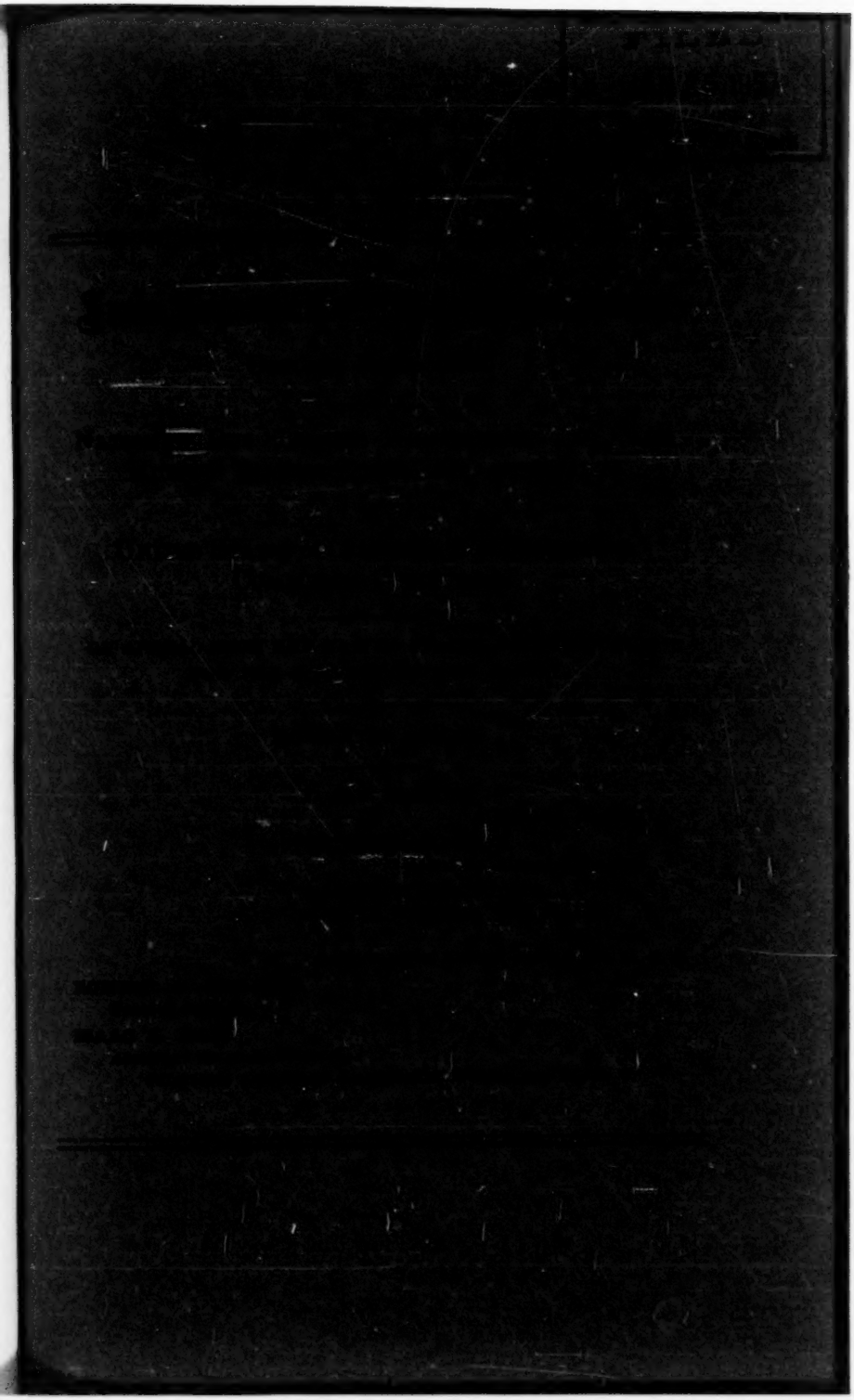
For the foregoing reasons, it is respectfully submitted that the decision of the District Court is correct and that this appeal presents no substantial questions. The judgment of the District Court should, accordingly, be affirmed.

ROBERT S. BUTTLES,
Attorney for Tauck Tours, Inc.

Certificate of Service

I, ROBERT S. BUTTLES, attorney for Tauck Tours, Inc., and a member of the Bar of this Court, do hereby certify that on January 22, 1957, I served the foregoing Motion to Affirm on the several parties, by depositing copies thereof in the United States Post Office, with First Class postage prepaid, addressed to all counsel of record at their respective post office addresses.

ROBERT S. BUTTLES,
Attorney for Tauck Tours, Inc.



INDEX

	Page
Statement	1
Argument	4
Conclusion	9

CITATIONS

Cases:	
Crescent Express Lines v. *United States*, 320 U. S. 401	6
Fordham Bus Corp., 29 M. C. C. 293, affirmed, *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712	6
Levinson v. *Spector Motor Co.*, 330 U. S. 649	8
Tauck Tours, Inc., 54 M. C. C. 291	3–4
United States v. *American Trucking Associations*, 310 U. S. 534	8
Statutes:	
Interstate Commerce Act, Part II, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*:	
Section 211 (a)	2, 4
Miscellaneous:	
Regulations Governing Special or Chartered Party Service, 29 M. C. C. 25	7

414699—57——1

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC., AND HUDSON TRANSIT LINES, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered August 17, 1956, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325. The judgment dismissed appellants' complaint which sought to set aside an order of the Interstate Commerce Commission extending the operating area of a broker of motor carrier transportation.

Tauck Tours, Inc. ("Tauck") has been in the "package tour" business since 1925. Following passage of Part II of the Interstate Commerce Act in 1935, the Interstate Commerce Commission granted Tauck a license under the "grandfather" clause to engage in brokerage operations within a limited geographical area.[1] In February 1948, Tauck filed with the Commission an application to extend its authority to cover all points in the United States. After extensive administrative proceedings, the Commission granted the application, subject to certain conditions. On appeal, a three-judge district court unanimously upheld the Commission's order.

The method of Tauck's operations was summarized by the district court as follows (Jur. St. 3a):

> Tauck's tours are all-expense arrangements, so-called "package tours". Tauck sells individual "certificates of membership" in a specific tour to individual travelers, who ordinarily make arrangements either through Tauck's own officers or through travel bureaus or similar factors, which serve as selling agents for Tauck. The single price which the individual tourist pays for his certificate of membership covers almost all of the expenses of the trip, specifically including transportation, meals, and hotel accommodations. Tauck ordinarily uses motor buses as the means of transportation on its tours but railroad and water transportation

[1] Section 211 of the Interstate Commerce Act provides for the licensing of "brokers" of motor transportation. The Commission has classified tour operators such as Tauck as "brokers" (Jur. St. 4a).

> are also employed occasionally. * * * Tauck's practice is to charter a motor bus from an operator holding a certificate of convenience and necessity from the Interstate Commerce Commission under Section 207 of the Interstate Commerce Act. See 49 USCA Section 307. Since Tauck plans its trips far in advance, it must also, at least on occasion, charter a motor vehicle before it or its agents have concluded the sale of certificates of membership to the general public for that particular trip.
>
> * * * Tauck estimated that 90% of the bus transportation arranged by it was obtained from charter operators at a flat rate for the hire of the whole bus. Tauck does not own any motor vehicles and does not lease any. It does not operate the buses or other transportation facilities itself. The chauffeur or driver, employed by the bus company, controls the vehicle. * * * Tauck does supply a tour director who looks after the comfort of the participants in the trip and is in general charge of accommodations and other similar arrangements.

In granting Tauck's application, the Commission held (*Tauck Tours, Inc.*, 54 M. C. C. 291, 304) that Section 211 (a) of the Interstate Commerce Act requires a broker to employ a carrier which has authority to "perform the particular type of motor transportation" which the broker provides; that a broker may use chartered transportation for "groups which it has assembled or organized," even though the group has not finally been formed when the charter is made, "provided the members in forming the group designate and accept it [the broker] as the agent of the

group for the purpose of arranging its transportation"[2] (*id.*, p. 302); and that Tauck tours involve more "than mere individual transportation," and constitute a true "group undertaking, even though the participants are unknown to one another prior to their being brought together" by Tauck (*ibid.*).

ARGUMENT

Appellants' basic contention is that Section 211 (a) of the Interstate Commerce Act prohibits a broker who operates all-expense group tours from using chartered buses to supply transportation for such tours. That section prohibits a broker from employing any motor carrier "which is not the lawful holder of an effective certificate or permit issued as provided in this part * * *." Appellants argue that "effective" certificate or permit means one which authorizes the particular kind of transportation the broker provides; that Tauck provides individually-ticketed transportation in its all-expense group tours in which it sells "certificates of membership"; and that a carrier's authority to provide charter services is not "effective" authority for such transportation.

We submit, however, that, even though Section 211 (a) requires a broker to use only carriers which have authority to render the particular transportation which the broker provides, the Commission and the district court correctly held that it does not prohibit

[2] The Commission granted the application subject to the condition, among others, that Tauck act as agent for the members of the tour collectively in arranging for transportation, and that its "certificates of membership" so provide.

a broker from using chartered buses in operating all-expense group tours.

Appellants' argument rests on the assumption that charter-service authority permits carriage only of groups which are "formed prior to the institution of negotiations for transportation" (Jur. St. 12). But the test of a true charter is not when the group is formed, but whether it is in fact a bona fide group travelling as a unit for a common purpose, and not just an aggregate of passengers whose sole common interest is obtaining cheap transportation to a common destination. If there is such a group, it is immaterial whether its membership is fixed before or after the bus is chartered.

A Tauck all-expense tour is such a bona fide group, and therefore meets the standard for charter service. As the district court pointed out (Jur. St. 14a), "[t]hough the individual membership certificates do entitle each individual Tauck patron to transportation and in that sense are 'tickets,' a good deal more than bare individual transportation is involved." A member of a Tauck tour also receives food, lodging, guide service, and all of the many other services which serve to provide a pleasant vacation. "The tour is attractive because it is a group adventure" (*ibid.*), "a cohesive whole interested in a tour for pleasure, and not in mere transportation" (*id.*, 15a). It is just as much a "bona fide" (Jur. St. 12) as such preformed units as athletic teams, travelling bands, school classes, etc., which traditionally use chartered buses. The members of a Tauck tour are not "individually

ticketed passengers" (*id.*, 15), but are joint participants in a group enterprise.

There is no merit to appellants' contention (Jur. St. 20–25) that the decision in this case would destroy the statutory distinction between special and charter services. The distinction does not turn, as appellants state (Jur. St. 21), on whether each passenger arranges for or purchases his own transportation individually, or whether a single contractor or pre-formed group-entity negotiates and contracts for the hire of the entire bus. On the contrary, as the Commission has held, the distinction is that "[c]harter service contemplates the transportation of groups * * * *assembled by someone other than the carrier,* who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour. Special service, on the other hand, contemplates that service rendered generally on week-ends, holidays, or other special occasions to a number of passengers *which the carrier itself has assembled into a travel group* through its own sales to each individual passenger of a ticket covering a particular trip or tour planned or arranged by the carrier" (emphasis added). *Fordham Bus Corp.*, 29 M. C. C. 293, 297, affirmed, *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712, 717 (S. D. N. Y.), cited with approval in *Crescent Express Lines* v. *United States*, 320 U. S. 401, 406. Since a Tauck tour is a group "assembled by someone other than the carrier," *i. e.*, by the broker, it involves charter, not special, service.

Appellants also contend (Jur. St. 29–31) that the grant of Tauck's application was in violation of the Commission's own regulations relating to charter service. They prohibit carriers from transporting individually ticketed passengers pursuant to charter authority. See *Regulations Governing Special or Chartered Party Service*, 29 M. C. C. 25, 47–49. But those regulations merely apply the settled distinction between charter and special services previously noted by prohibiting a carrier which does not have special service authority from carrying individually ticketed passengers on tours which it organizes. They do not prohibit a broker from using a chartered bus in an all-expense group tour which it organizes, and which involves more than bare transportation.

Appellants' fear (Jur. St. 11, 17–18) that permitting brokers to use charter services in operating package tours would result in "nullification" of Commission regulation of scheduled passenger motor carrier service is groundless. There is nothing in the record to show, or even suggest, that Tauck operates its tours as a device to provide scheduled passenger transportation by carriers which have no authority to render such service. On the contrary, Tauck has been operating package tours in this manner for 30 years without any apparent encroachment on the operations of the scheduled carriers. Moreover, as the district court pointed out (Jur. St. 13a–14a), if "other transportation entrepreneurs who also are licensed as 'brokers' are able to make use of arrangements similar

to Tauck's for illegitimate ends of their own * * * the powers of the Commission are ample to investigate their actions, cancel their licenses or certifications, and, if necessary, make rules and regulations to correct possible abuses."

The Commission's interpretation that Section 211 (a) does not preclude a broker from using chartered buses in the operation of its package tours represents a reasonable application of its "long record of practical experience with this subject" which is "entitled to special consideration." *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 672; see also, *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.[3]

---

[3] There is no basis for appellants' contention (Jur. St. 33–35) that the district court failed properly to exercise its reviewing power. The court carefully considered the statutory issues which appellants presented, but concluded that the Commission's interpretation of the Act, which reflected its "expertness * * * in the field Congress has confided to it," was a reasonable one (*id.*, 13a). The court also considered and rejected appellants' policy arguments as to why the Commission's interpretation was erroneous (*id.*, 13a–15a).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
HENRY NEWTON WILLIAMS,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
ISAAC K. HAY,
Assistant General Counsel,
Interstate Commerce Commission.

JANUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

FILED
JAN 26 1957
JOHN T. FEY, Clerk

No. 681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the United States District Court for the District of New Jersey

---

MOTION TO AFFIRM ON BEHALF OF THOS. COOK & SON, INC., AND PARKER TOURS, INC., ET AL., INTERVENERS

S. HARRISON KAHN,
Attorney for
Thos. Cook & Son, Inc.,
and
Parker Tours, Inc., et al.,
Interveners,
726-734 Investment Building,
Washington 5, D. C.

January 26, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument	5
(a) Appellants are Seeking a Second Review of the Evidence	5
(b) Affirmance Per Curiam Herein Would be in Harmony With Prior Action of This Court in Cases Involving Similar Legal Principles	9
Conclusion	11
Certificate of Service	12

CITATIONS

Acme Fast Freight, Inc. v. United States, 338 U.S. 855	9
All States Freight, Inc. v. United States, 344 U.S. 804	9
Beard-Laney, Inc. v. United States, 338 U.S. 803	9
Boston Sand Co. v. United States, 278 U.S. 41, 48	6
Brady Transfer & Storage Co. v. United States, 335 U.S. 875	9
Brooks Transportation Co., Inc. v. United States, 340 U.S. 925	9
Brooks Transportation Co., Inc. v. United States, 344 U.S. 804	9
Crichton v. United States, 323 U.S. 684	9
Falwell v. United States, 330 U.S. 807	9
Herrin Transportation Co., Inc. v. United States, 344 U.S. 925	10
Howard Hall Co., Inc. v. United States, 328 U.S. 818	9
Jack Cole Co., Inc. v. United States, 324 U.S. 822	9
Luckenbach Steamship Co., Inc. v. United States, 347 U.S. 984	10
Malone Freight Lines v. United States, 344 U.S. 925	10
Miami Transportation Co. v. United States, 332 U.S. 803	9
Motor Haulage Co., Inc. v. United States, 331 U.S. 784	9
N.L.R.B. v. Coca Cola Bottling Co., 350 U.S. 264, 269 (1956)	7

Page

N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) .. 6, 7
National Bus Traffic Association, Inc. v. United States, 122 F. Supp. 876 (D.C. N.J. 1954) 4
National Bus Traffic Association, Inc. v. United States, 143 F. Supp. 689 (D.C. N.J. 1956) 5
National Labor Relations Board v. American National Insurance Company, 343 U.S. 395 6
National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498 6
Newtex Steamship Corp. v. United States, 344 U.S. 901 10
O. C. Wiley & Sons, Inc. v. United States, 338 U.S. 902 9
Pomprowitz v. United States, 348 U.S. 803 10
Radio Corporation of America v. United States, 341 U.S. 412 6
Riss & Co. v. United States, 342 U.S. 937 9
Shein v. United States, 343 U.S. 944 9
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 ..... 5, 7
Warner, et al. v. United States, 341 U.S. 907..... 9

APPLICATIONS

49 M.C.C. 491 (1949) 3
52 M.C.C. 373 (1950) 4
54 M.C.C. 291 (1952) 4
54 M.C.C. 288 4
63 M.C.C. 493 4

STATUTES CITED

Interstate Commerce Act:

Section 211(b) 2, 6, 10, 11
Section 206(a) 9
Section 207(a) 9
Section 5(2)(b) 9

REGULATIONS CITED

Special or Chartered Party Service: 29 M.C.C. 25 (1941) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the United States District Court for the District of New Jersey

---

MOTION TO AFFIRM ON BEHALF OF THOS. COOK & SON, INC., AND PARKER TOURS, INC., ET AL., INTERVENERS

Appellees, Thos. Cook & Son, Inc., and Parker Tours, Inc., et al., pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court in this action be affirmed, because the questions presented by this appeal "are so unsubstantial as not to need further argument". (Rule 16, 1(c)).

This is a direct appeal from the final judgment entered on August 17, 1956 by a specially constituted District Court of three judges convened pursuant to

Section 2284, Title 28, United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated April 18, 1955 in Docket No. MC-29488 (Sub No. 3), Tauck Tours, Inc. Extension, New York, N. Y. The notice of appeal herein was filed on October 11, 1956 and the Appellants' Jurisdictional Statement was served on December 28, 1956.

STATEMENT OF THE CASE

The Commission's order, entered in a proceeding under Section 211(b)[1] of the Interstate Commerce Act granted an application filed by Tauck Tours, Inc. of New York, N. Y., hereinafter termed "Tauck" for an extension of its existing authority as a broker to conduct operations in interstate or foreign commerce. Tauck, under an appropriate license[2] from the Com-

---

[1] Title 49 U.S.C. section 311(b). The provisions of this section of the statute are as follows:

> "(b) A brokerage license shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the license, is, or will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise, such application shall be denied. Any broker in operation on October 1, 1935 may continue such operation for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, the broker may, under such regulations as the Commission shall prescribe, continue such operations until otherwise ordered by the Commission."

[2] Interstate Commerce Commission Docket MC-29488.

mission operates as a broker at New York, N. Y., and Newark, New Jersey, of transportation by motor vehicle of passengers and their baggage, between New York and Newark, on the one hand, and, on the other, points in Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and the District of Columbia; between Washington, D. C., on the one hand, and, on the other, points south of Washington in the above named states; and at New York,[3] Newark, and Philadelphia, Pennsylvania, on sightseeing tours, from New York and Newark to points in Alabama, Mississippi and Louisiana, and return, with no pickup or discharge of passengers enroute, except at Washington, D. C.

As pointed out by the District Court Tauck's application to the Commission was considered a number of times with different results.

After hearing before an examiner of the Commission and service of his proposed report in which the application was denied for the reason that the examiner considered Tauck a common carrier, Division 5 of the Commission, upon consideration of exceptions to the examiner's report, concluded that Tauck was a broker and granted it the requested geographic extension, but expressly conditioned the authority. (49 M.C.C. 491 (1949)).

Thereafter Tauck was joined by other tour brokers[4] and by the American Society of Travel Agents, an organization whose membership includes almost 500

---

[3] Interstate Commerce Commission Docket MC-29488 (sub No. 2).

[4] Thos. Cook & Son, Inc. and Parker Tours, Inc., et al., are well known brokers in the industry.

active travel agents in 44 states, and petitioned for reconsideration.[5]

Upon reconsideration, Division 5 again confirmed the issuance of the requested authority to Tauck and permitted Tauck to use charter bus service provided the certificates of membership issued to participants conformed to the views expressed by the Division. (52 M.C.C. 373 (1950)). Petitions for reconsideration of the second decision of Division 5 were filed; as a result of which, the Commission, on April 21, 1952, in substance, affirmed the order of Division 5 on reconsideration permitting Tauck to use charter bus service. The conditions specified in this order were spelled out with particularity. (54 M.C.C. 291) (1952). The decision of the entire Commission was the subject of a complaint in the United States District Court for the District of New Jersey. The Court[6] there vacated the order of the Commission of November 3, 1952 denying protestants' petition for reconsideration, to the end that the Commission might make a clear and definitive order implementing its report of April 21, 1952 (54 M.C.C. 288).

The Tauck application record was thereafter reviewed by the entire Commission, and again the Commission confirmed its earlier decision granting Tauck's application for an extension in its operations, subject to acceptable conditions (63 M.C.C. 493).

---

[5] The travel agents are vitally affected because they promote and sell the tours put together by Tauck and other such brokers for commission.

[6] *National Bus Traffic Association, Inc.* v. *United States,* 122 F. Supp. 876 (D. C. N. J. 1954).

Thereafter, Appellants once again brought an action in the District Court to set aside the Commission's Order. The same Judges who had presided in the prior suit heard the case, and after a careful consideration of the contentions which the Appellants had unsuccessfully argued three times previously before the Commission, entered judgment dismissing the Complaint.[7] It is from this Judgment that the Appellants appeal to this Court.

ARGUMENT

(a) Appellants are Seeking a Second Review of the Evidence

Appellants disagree with the above holdings of the District Court and seek to have this Court reexamine the record to determine whether the District Court was correct.

This Court has indicated its attitude toward such requests. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. In that case the Supreme Court spelled out the proper standard of review of administrative orders, and then continued (pp. 490-91):

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

---

[7] *National Bus Traffic Association, Inc.* v. *United States,* 143 F. Supp. 689 (D. C. N. J. 1956).

See also *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498; *Radio Corporation of America* v. *United States,* 341 U.S. 412. In *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395, at page 410, this Court reaffirmed its prior statement that it "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way or the other, though fairminded judges could find it tilting either way."

This Court also noted that the rule had special application to cases where "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case"—a statement equally applicable to the statutory standard in Section 211(b) of the Act of what is "consistent with the public interest."

The determination of the nature of Tauck's operations is merely a question of fact and should properly be left to the determination of the appropriate expert body, the Interstate Commerce Commission. This is particularly true when the terms "chartered party" and "chartered operations" are not defined in the statute. *N. L. R. B.* v. *Hearst Publications,* 322 U.S. 111 (1944). Indeed in a recent case, involving the meaning of the word "officer" in Section 9(h) of the National Labor Relations Act, this Court reaffirmed this aspect of the *Hearst* case in the following words:

> ". . . if the word be deemed to have a peculiar connotation for those intimate with trade union affairs, it is incumbent upon us to give the word its technical meaning, (*Boston Sand Co.* v. *United States,* 278 U.S. 41, 48) for Section 9(h)

> is an integral part of the statute whose sponsors were familiar with labor organization and labor problems, and which was doubtedless drawn by specialists in labor relations. If *such be the case, then, of course, the Board's expertness comes into play. We should affirm its definition if that definition does not appear too far fetched . . .*" *N. L. R. B.* v. *Coca Cola Bottling Co.*, 350 U.S. 264, 269 (1956). (Emphasis supplied).

Examination of the opinion of the District Court shows that it neither misapprehended nor misapplied the standards of review established by this Court in the *Universal Camera* and *Hearst Publications* cases.

In the *Universal Camera* case this Court (making it clear that it was speaking of the standards set by the Administrative Procedure Act generally as well as by the Labor Management Relations Act, see 340 U.S. 474, at pp. 487, 490) emphasized the responsibility of a court called upon to enforce or set aside an administrative order. "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." 340 U.S. 474, at 490. What the reviewing court should do was clearly set forth (id. at 487-488):

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . . Congress has

> merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Appellants contend that the Order of the Commission violates both its own Regulations, and the rule making requirements of the Administrative Procedure Act insofar as it creates "exceptions to the unrestricted direct prohibition specified in the regulations, the effect of which is to curtail and revoke partially that prohibition, and to change entirely the criterion of charter service from that specified in the regulations." (Jurisdictional Statement, page 31).[8]

Appellants' contention lacks substance. The regulations which the Appellants claim to have been unlawfully amended apply only, as the lower Court pointed out "to those special parties carried incidentally by regular route operators, *and not to transportation by charter operators who do not have regular route authority at all or to motor transportation brokers.*" (143 F. Supp. at 693).

It would appear that the District Court not only correctly comprehended its duties and function but also discharged them.

---

[8] See *Regulations—Special or Chartered Party Service,* 29 M.C.C. 25 (1941).

(b) Affirmance Per Curiam Herein Would be in Harmony With Prior Action of This Court in Cases Involving Similar Legal Principles

Decisions of this Court in recent years have consistently affirmed by per curiam orders, decisions of the Interstate Commerce Commission involving motor carrier operations under the "grandfather" clause, "public convenience and necessity" sections, and acquisition provisions of Sections 206(a), 207(a), and 5(2)(b) of the Interstate Commerce Act (49 U.S.C. Secs. 306(a)(1); 307(a); and 5(2)(b)). Among those decisions, all per curiam, are:

Crichton v. *United States*, 323 U.S. 684;
Jack Cole Co., Inc. v. *United States*, 324 U.S. 822;
Howard Hall Co., Inc. v. *United States*, 328 U.S. 818;
Motor Haulage Co., Inc. v. *United States*, 331 U.S. 784;
Falwell v. *United States*, 330 U.S. 807;
Miami Transportation Co. v. *United States*, 332 U.S. 803;
Brady Transfer & Storage Co. v. *United States*, 335 U.S. 875;
Beard-Laney, Inc. v. *United States*, 338 U.S. 803;
Acme Fast Freight, Inc. v. *United States*, 338 U.S. 855;
O. C. Wiley & Sons, Inc. v. *United States*, 338 U.S. 902;
Warner, et al. v. *United States*, 341 U.S. 907;
Brooks Transportation Co., Inc. v. *United States*, 340 U.S. 925;
Riss & Co. v. *United States*, 342 U.S. 937;
Shein v. *United States*, 343 U.S. 944;
Brooks Transportation Co., Inc. v. *United States*, 344 U.S. 804;
All States Freight, Inc. v. *United States*, 344 U.S. 804;

Newtex Steamship Corp. v. *United States*, 344 U.S. 901;
Malone Freight Lines v. *United States*, 344 U.S. 925;
Herrin Transportation Co., Inc. v. *United States*, 344 U.S. 925;
Luckenbach Steamship Co., Inc. v. *United States*, 347 U.S. 984, and
Pomprowitz v. *United States*, 348 U.S. 803.

The finding of the Commission that the application should be approved as "consistent with the public interest" and the "National Transportation Policy" contained in the Interstate Commerce Act under Section 211(b) was based upon evidence which the District Court held met the requirements established under the statute. The court declared that the dispute before it was not whether Tauck should have been granted the specified geographical extension it sought—"this is conceded"—but whether Tauck shall be permitted to use, as it had in the past, chartered motor vehicles to transport its passengers as appears in the reports of the Commission. The subsidiary findings included a recognition that Tauck is an independent entrepreneur: — supplying a useful service for the public; that the business of Tauck is one intended by the Interstate Commerce Act to be protected as well as regulated.

The District Court carefully reviewed the evidence to support these findings; determined that in light of the entire record the order of the Commission should not be set aside; that the Commission's determination of the issues is in the interest of the National Transportation Policy, and that due credit must be given to the expertness of the Commission in the field Congress has confided to it.

It is submitted that these conclusions of the District Court were plainly correct and this appeal presents no questions of substance warranting further review by this Court.

The Congress of the United States enacted federal motor carrier legislation in 1935 and since that time the Interstate Commerce Commission has considered a vast number of proceedings under Section 211(b) of Part II of the Interstate Commerce Act. Criteria for the exercise of the administrative authority of the disposition of these cases by the Commission has been established clearly by the Courts. See cases cited at pages 9 and 10 of this motion. The Commission patently acted herein within the boundaries of these decisions.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the District Court is correct, and that the alleged questions appellants desire to present to this Court are so unsubstantial as not to need further argument. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

S. Harrison Kahn,
Attorney for
Thos. Cook & Son, Inc.,
and
Parker Tours, Inc., et al.,
Interveners.

January 26, 1957

Certificate of Service

I hereby certify that I have served a copy of this motion upon the following Counsel of record by depositing a copy of this motion in the United States mail, this 26th day of January, 1957, with first-class postage prepaid, addressed to each Counsel at his post office address:

James F. X. O'Brien, Esq.,
17 Academy Street,
Newark, N. J.

Jack R. Turney, Jr., Esq.,
Eugene T. Liipfert, Esq.,
2001 Massachusetts Ave., N.W.,
Washington, D. C.

Francis V. Goggins, Esq.,
60 East 42nd Street,
New York, N. Y.

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington, D. C.

Isaac K. Hay, Esq.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington, D. C.

S. Harrison Kahn

726-734 Investment Building,
Washington 5, D. C.

FILED
JAN 23 195
JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal From the United States District Court for the District of New Jersey

---

MOTION TO AFFIRM

HARRY A. BOWEN
JERROLD SCOUTT, JR.
Attorneys for
American Society of
Travel Agents, Inc.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Bingler Vacation Tours v. *United States*, 132 F. Supp. 793 (D. C. N. J. 1955), *aff'd per curiam*, 350 U. S. 921 (1955)	7
Crescent Express Lines, Inc. v. *United States*, 320 U. S. 401 (1943)	7
Fordham Bus Corp. Common Carrier Application, 29 M. C. C. 293 (1941)	7
Fordham Bus Corp. v. *United States*, 41 F. Supp. 712 (D. C. S. D. N. Y. 1941)	7
Gibson Wine Co. v. *Snyder*, 194 F. 2d 329 (D. C. Cir. 1951)	9
National Bus & Traffic Association v. *United States*, 122 F. Supp. 876 (D. C. N. J. 1954)	5
N. L. R. B. v. *Coca-Cola Bottling Co.*, 350 U. S. 264 (1956)	7, 8
N. L. R. B. v. *Hearst Publications*, 322 U. S. 111 (1944)	7
O'Leary v. *Brown-Pacific-Maxon*, 340 U. S. 504 (1951)	8
Radio Corporation of America v. *United States*, 341 U. S. 412 (1951)	10
Regulations—Special or Chartered Party Service, 29 M. C. C. 25 (1941)	8, 9
Tauck Tours, Inc., Extension—New York, N. Y., 49 M. C. C. 491 (1949)	4
Tauck Tours, Inc., Extension—New York, N. Y., 52 M. C. C. 373 (1950)	4
Tauck Tours, Inc., Extension—New York, N. Y., 54 M. C. C. 291 (1952)	4
Tauck Tours, Inc., Extension—New York, N. Y., 63 M. C. C. 493 (1955)	5

Page

Union Pacific R.R. v. *United States*, 222 U. S. 541 (1912) 10

United States v. *Pierce Auto Lines*, 327 U. S. 515 (1946) 9, 10

Universal Camera Corp. v. *N. L. R. B.*, 340 U. S. 474 (1951) 8

STATUTE:

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 301 *et seq.*:

Sec. 211(a) 2, 3, 6

Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. 1001, *et seq.*:

Sec. 4 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal From the United States District Court for the District of New Jersey

---

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the American Society of Travel Agents, Inc., Appellee-intervenor, moves that the judgment of the District Court be affirmed on the ground that the questions on which the decision of the

cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment, entered August 17, 1956, by a three judge District Court convened pursuant to 28 U. S. C. 2284 and 2325. The judgment unanimously dismissed Appellants' complaint seeking to set aside an order of the Interstate Commerce Commission whereby appellee-intervenor Tauck Tours, Inc. ("Tauck") had been granted a license authorizing the extension of its operations as a broker. The contested order is the latest in an eight-year series of administrative and judicial decisions stemming from an application made by Tauck in 1948.

Briefly stated, the facts and history of the case are as follows:

Tauck is a broker, duly licensed by the Commission under Section 211 of the Interstate Commerce Act, (49 U. S. C. 311), to arrange for the transportation of passengers. The particular type of business engaged in by Tauck is the organization of all-expense-paid tours—a well established branch of the industry with a substantial number of operators. Tauck itself has been in this business since 1926. The significant feature of the all-expense tours as operated by Tauck is that the customer makes one payment to Tauck for which he receives a vacation "package"—transportation, meals, hotel, incidental sight seeing and the services of a guide or tour conductor. The customer enjoys this package as one of a group of other customers who have purchased the particular tour.

For instance, on Tauck's 13-day tour to French Canada, the customer pays $265.00. His vacation "package" includes 2,200 miles of transportation, 39 meals, 13 nights at hotels, many sight seeing excursions; the customer is a member of a group of other people who are interested in this particular tour and is accompanied by a guide or tour conductor who not only calls attention to points of interest along the route but is responsible for the customer's baggage, seeing that his room is available, meals paid for, etc.

Prior to 1948, Tauck's authority was limited to the procurement of transportation in certain specified states. Pursuant to Section 211 of the Interstate Commerce Act (49 U. S. C. 311) Tauck applied in 1948 for a license authorizing the geographical extension of its operations to all points in the United States.[1] In accordance with his previous practice Tauck proposed to arrange for the transportation of all-expense tour groups by carriers whose authority permitted only charter service, as distinct from individual-ticket transportation.

After a hearing, in which Tauck adduced evidence in support of its application, a recommendation was made by the Examiner that the application be denied. Tauck duly filed exceptions to the recommendation. At this point, appellant National Bus and Traffic Association ("NBTA") intervened in support of the Examiner's recommendation. *Inter alia,* NBTA argued, as it does now, that it was unlawful for tour brokers such as Tauck to employ carriers whose authority was limited to charter operations.

---

[1] *Tauck Tours, Inc. Extension,* Docket No. MC-29488, (Sub. No. 3).

Division 5 of the Commission handed down its Initial Report on August 4, 1949.[2] It reversed the Examiner's recommendation, and granted the application, subject to the requirement that Tauck employ, not charter operators, but only regular route carriers or carriers engaged in special operations.

Thereafter Tauck was joined by other tour brokers and by the American Society of Travel Agents, an organization whose membership includes almost 500 active travel agents in 44 states, and petitioned for reconsideration.[3] On January 26, 1951, a Report on Reconsideration was handed down by Division 5.[4] With but a partial dissent, Division 5, after a detailed examination of appellants' contentions, found that Tauck's all-expense tours were conducted on a *group* as distinct from an *individual* basis, even though Tauck assembled the group by negotiations with individual members of the public. Accordingly, it held that Tauck's groups were entitled to the use of charter transportation.

Subsequent to Division 5's Report on Reconsideration, appellants herein petitioned for, and were granted, reconsideration by the entire Commission. All contentions raised in this appeal were fully examined both in Brief and in Oral Argument. On April 21, 1952, the Commission handed down its Report on Oral Argument[5] which answered every contention,

---

[2] 49 M. C. C. 491.

[3] The travel agents are vitally affected because they promote and sell the tours put together by Tauck and other such brokers for commission.

[4] 52 M. C. C. 373.

[5] 54 M. C. C. 291.

both legal and factual, advanced by the appellants, and which, with two dissents, affirmed the Report on Reconsideration made by Division 5.

Petitions for further reconsideration having been carefully considered and denied, Appellants sought to set aside the Commission's Order in the District Court for the District of New Jersey. The Court vacated the "Order" on the narrow ground that the final report of the Commission had not contained an *order,* and was therefore not subject to review under 28 U. S. C. 2321.[6]

On Remand, the Commission, having considered and denied still further Petitions by the Appellants, issued, with the concurrence of all members participating, its Report and Order of April 18, 1955,[7] whereby it affirmed its prior Report.

Thereafter, Appellants once again brought an action in the District Court to set aside the Commission's Order. The same Judges who had presided in the prior suit heard the case, and after a careful consideration of the contentions which the Appellants had unsuccessfully argued three times previously before the Commission, entered judgment dismissing the Complaint.[8] It is from this Judgment that the Appellants appeal to this Court.

---

[6] *National Bus and Traffic Association* v. *United States,* 122 F. Supp. 876 (D. C. N. J. 1954).

[7] 63 M. C. C. 493.

[8] *National Bus and Traffic Association* v. *United States,* 143 F. Supp. 689 (D. C. N. J. 1956).

ARGUMENT

1. Appellants' principal contention is that the Commission erroneously construed Section 211(a) of the Interstate Commerce Act (49 U. S. C. 311(a)), (Jurisdictional Statement, pp. 19-29). The construction complained of authorizes Tauck to employ carriers for the transportation of its all-expense tours which have authority to engage only in charter operations. This, say the Appellants, violates the first *proviso* of section 211(a), because in reality Tauck is procuring individual-ticket transportation from carriers not authorized to perform it, and which therefore do not have "effective certificates" as required by the *proviso.* From this point, the Appellants proceed to argue that the Commission was without jurisdiction to grant the license, since any such grant would be in violation of the Act, and therefore forbidden by Section 211(b), (49 U. S. C. 311(b)).

The fallacy of Appellants' argument, notwithstanding their protestation to the contrary at page 7 of their Jurisdictional Statement, is that it is merely a controversy over the *facts* of the case. The principal issues raised by the Appellants are factual ones and are to be resolved in the first instance, as Appellants appear to agree,[9] by a determination of whether each passenger purchases his own transportation *individually,* or whether a sole contractor or *group* agrees to the hire of an entire bus. The issues can be resolved, in the second instance, by determining whether Tauck's Tours constitute "bare transportation" or something in addition thereto.

---

[9] See Jurisdictional Statement, p. 21.

If Tauck's Tours involve the hiring of a bus for a group through the agency of a sole contractor,[10] and if something more than bare transporation is involved,[11] then it is settled that the transportation is charter service and that Tauck may employ a carrier authorized to perform only charter service.

The determination of the nature of Tauck's operations is merely a question of fact and should properly be left to the determination of the appropriate expert body, the Interstate Commerce Commission. This is particularly true when the terms "chartered party" and "chartered operations" are not defined in the statute. *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111 (1944). Indeed in a recent case, involving the meaning of the word "officer" in Section 9(h) of the National Labor Relations Act, this Court reaffirmed this aspect of the *Hearst* case in the following words:

> ". . . if the word be deemed to have a peculiar connotation for those intimate with trade union affairs, it is incumbent upon us to give the word its technical meaning, (*Boston Sand Co.* v. *United States*, 278 U. S. 41, 48) for Section 9(h) is an integral part of the statute whose sponsors were familiar with labor organization and labor problems, and which was doubtedless drawn by specialists in labor relations. If *such be the case, then, of course, the Board's expertness comes into play. We should affirm its definition if that definition does not appear too far fetched . . .*"

---

[10] *Fordham Bus Corp. Common Carrier Application*, 29 M. C. C. 293, 297 (1941), *aff'd. Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712 (D. C. S. D. N. Y. 1941) cited in *Crescent Express Lines* v. *United States*, 320 U. S. 401, 406 n. 5 (1943).

[11] *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793 (D. C. N. J. 1955), *aff'd per curiam*, 350 U. S. 921 (1955).

N. L. R. B. v. *Coca Cola Bottling Co.*, 350 U. S. 264, 269 (1956). (Emphasis supplied).

The situation here is the same. As the lower Court pointed out, the Commission found that Tauck's operations were such that a contract made by him as agent for a group could "be deemed a true 'charter' ". 143 F. Supp. at 695.

If this finding is supported by substantial evidence on the record considered as a whole (which Appellants appear to concede by asserting that "the controversy in this case is not over the facts"[12]), then the Commission's determination is to be accepted. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504 (1951).

Accordingly, it is submitted that the question to be resolved is one of fact rather than of law, and therefore presents no substantial issue for decision by this Court.

2. Appellants next contend that the Order of the Commission violates both its own Regulations, and the rule making requirements of the Administrative Procedure Act insofar as it creates "exceptions to the unrestricted direct prohibition specified in the regulations, the effect of which is to curtail and revoke partially that prohibition, and to change entirely the criterion of charter service from that specified in the regulations." (Jurisdictional Statement, page 31).[13]

Appellants' contention lacks substance. The regulations which the Appellants claim to have been un-

[12] Jurisdictional Statement, p. 7.

[13] See *Regulations—Special or Chartered Party Service*, 29 M. C. C. 25 (1941).

lawfully amended apply only, as the lower Court pointed out, "to those special parties carried incidentally by regular route operators, *and not to transportation by charter operators who do not have regular route authority at all or to motor transportation brokers.*" (143 F. Supp. at 693).[14]

Even if the regulations were applicable to the instant case, the Administrative Procedure Act expressly excepts from the rule making requirements of the Act, "interpretative rules". (Administrative Procedure Act, Section 4, 5 U. S. C. 1003), especially when such interpretations are made during the course of a quasi-judicial proceeding. *Gibson Wine Co.* v. *Snyder,* 194 F. 2d 329 (D. C. Cir. 1951).

3. Appellants finally contend that the lower Court did not act as a proper reviewing tribunal, in that it failed to decide the issues on the basis of the law, but rather decided them according to the equities and the economic facts of the case. (Jurisdictional Statement, pages 33 to 35).

It is submitted that, in the light of the decisions of this Court, it is abundantly clear that the lower Court properly discharged its duties as a Court of review. Thus the lower Court after a careful consideration of Appellants' contentions said that its "powers of review are limited", that it "may not set aside the Commission's Order simply because (it) might have reached a different conclusion", and that it "must give due credit to the expertness of the Commission in the field Congress has confided to it." (143 F. Sup. 695, 696). In *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 536 (1946), this Court said:

---

[14] See id., Rule VI, at p. 49.

> "The function of the reviewing Court is much more restricted. It is limited to ascertaining whether there is a warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from the requirements of the law, or abuse of the Commission's discretion, the reviewing Court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations, or others for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."[15]

Furthermore, the lower Court was correct in a case of this nature in looking to the economic facts involved. Such action by the lower Court is in accordance with the following language of this Court in the *Hearst* case, *supra:*

> ". . . the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, *by underlying economic facts rather than technically and exclusively by previously established legal classifications.*" (At page 129) (Emphasis supplied)

Since the lower Court reviewed the decision of the Commission in accordance with long established and well known decisions of this Court, it is respectfully submitted that Appellants' final contention is one long since settled, and therefore lacking in substance.

---

[15] See also *Radio Corporation of America* v. *United States*, 341 U. S. 412, 420 (1951); *I. C. C.* v. *Union Pacific Railroad*, 222 U. S. 541, 547 (1912).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore respectfully submitted that the Judgment of the District Court should be affirmed.

HARRY A. BOWEN
JERROLD SCOUTT, JR.
Attorneys for
American Society of
Travel Agents, Inc.

Certificate of Service

I, Harry A. Bowen, attorney for American Society of Travel Agents, Inc., and a member of the Bar of this Court, do hereby certify that on January 28, 1957, I served the foregoing Motion to Affirm on the several parties, by depositing copies thereof in the United States Post Office, with First Class postage prepaid, addressed to all counsel of record at their respective post office addresses.

HARRY A. BOWEN
Attorney for
American Society of
Travel Agents, Inc.

INDEX

Page

Statement 1

Argument 2

Point 1. The Motions to Affirm Ignore the Fundamental Issue 2

Point 2. The Motion of Appellees Should Be Denied 10

Point 3. The Motion of Intervenor-Appellee, Tauck Tours, Inc., Should Be Denied 16

Point 4. The Other Motions to Affirm Should Be Denied 19

Conclusion 22

Proof of Service 23

TABLE OF CASES

Asbury Park-New York Transit Corp. v. Bingler Vacation Tours, Inc. (1954), 62 M.C.C. 731, affirmed Bingler Vacation Tours, Inc. v. United States, D.C.N.J. (1955), 132 F. Supp. 793; affirmed per curiam, 350 U.S. 921 ..... 12, 13, 15

August Bingler—Common Carrier Application (1942), 41 M.C.C. 839 (not printed in full) 12, 15, 17

Bingler Vacation Tours, Inc. v. United States, D.C.N.J. (1955), 132 F. Supp. 793; affirmed per curiam, 350 U.S. 921 ..... 12, 15

Blue and Grey Sightseeing, Inc.—Common Carrier Application (1938), 8 M.C.C. 124 ..... 11, 12, 13

Crescent Express Lines, Inc. v. United States (1943), 320 U.S. 401 ..... 4, 5

Fordham Bus Corp.—Common Carrier Application (1941), 29 M.C.C. 293, affirmed Fordham Bus Corp. v. United States, S.D.N.Y. (1941), 41 F. Supp. 712 ..... 13, 14, 15, 18

N.L.R.B. v. Coca Cola Bottling Co. (1956), 350 U.S. 264 ..... 19, 20, 21

N.L.R.B. v. Hearst Publications (1944), 322 U.S. 111 .. 19, 20

Page

Red Star Sightseeing Line, Inc.—Common Carrier Application (1937), 1 M.C.C. 521 ..... 12, 15, 16
Tauck Tours, Inc., Extension—New York, N. Y. (1949), 49 M.C.C. 491 ..... 6, 13
Tauck Tours, Inc., Extension—New York, N. Y. (1952), 54 M.C.C. 291 ..... 7, 8
United States v. Maher (1939), 307 U.S. 148 ..... 4, 5

STATUTES

Administrative Procedure Act, 5 U.S.C. Sec. 1003 21

Interstate Commerce Act, Title 49 U.S.C.
Sec. 307 ..... 4, 8, 10, 11, 12
Sec. 308 ..... 5, 6, 8, 10, 11
Sec. 311 ..... 4, 10, 17

OTHER AUTHORITIES

50 Am. Jur. Statutes, Sec. 249 15
Regulation of Transportation Agencies, Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 192 3
Regulations—Special or Chartered Party Service (1941), 29 M.C.C. 25 ..... 6, 8, 9, 15, 18, 21
Remarks of Senator Wheeler, discussing Sec. 311(a), Cong. Rec. 5878, April 15, 1935 4
Report of Federal Coordinator of Transportation, House Doc. No. 89, 74th Cong., 1st Sess. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 661

NATIONAL BUS TRAFFIC ASSOCIATION, INC. and HUDSON TRANSIT LINES, INC., *Appellants*,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

---

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, Appellants file this Brief in Opposition to the four Motions to Affirm filed by Appellees and Intervenor-Appellees.[1]

---

[1] Namely, Joint Motion of Appellees, United States of America and Interstate Commerce Commission, Joint Motion of Thos. Cook & Son, Inc. and Parker Tours, Inc., et al, Motion of American Society of Travel Agents, and Motion of Tauck Tours, Inc.

ARGUMENT

All of the Motions have one thing in common, in that they ignore or wholly misconstrue the fundamental issue, the substantiality of which is discussed in the Jurisdictional Statement, pages 11-18, and 25-27. It was that issue which caused this case to become a test case before the Interstate Commerce Commission and in the courts, and which caused the motor bus industry, on the one hand, and the travel-agent industry, on the other, to become the most active participants. The first point in this Brief will be devoted to that fundamental issue. Succeeding points will deal with the subordinate questions and arguments in the Motions.

Point 1. The Motions to Affirm Ignore the Fundamental Issue

The fundamental issue is whether the statutory construction upon which the Commission's decision squarely rests, and which was affirmed by the Court below, would destroy effective regulation and defeat the clear Congressional intent expressed in the Motor Carrier Act. If such destruction will result, none of the incidental arguments and excerpted phrases in the Motions can justify the interpretation made.

The Commission's construction cannot fail to result in such destruction. In the first place, it permits the very type of competition which the Motor Carrier Act was passed to eliminate. Prior to the Act, dependable motor bus service for the public had, in many places, been demoralized by operators who would assume no responsibility for day-in-and-day-out-service, but would run only when there was a sufficient volume of pleasure travel to assure them a load. Then, as now, a principal source of interstate bus revenues come

from pleasure travelers, particularly those moving in sufficient volume to make a busload or group. Such operations diverted needed revenues from the carriers who attempted to assume the responsibility of day-in-and-day-out *scheduled* service, along with the non-scheduled service provided for such travelers along their routes. The result was that bankruptcies and abandonments of operations were rampant, frequently leaving the public without safe or adequate service. In submitting the initial draft of the Motor Carrier Act to Congress, the Federal Coordinator of Transportation (with the endorsement of the Interstate Commerce Commission) evaluated state regulation of passenger carriers thus:[2]

> "The major difficulties encountered have been in suppressing unauthorized intrastate operations and in controlling interstate carriers. An example of the former include instances in which the owners of passenger vehicles regularly transport a few persons, as employees, to and from work, or occasionally conduct sightseeing or excursion trips, or transport members of 'community associations' or other organized groups formed for the purpose of evading common-carrier regulation."

Coordinator Eastman gave specific recognition to the fact that regular-route bus operators are even more vulnerable than regular-route freight carriers to the destructive competition of irregular-route operators, when, in submitting the revised draft of the Act to Congress for enactment, he declared:[3]

---

[2] Regulation of Transportation Agencies, Sen. Doc. No. 152, 73d Cong., 2d Sess., p. 192.

[3] Report of Federal Coordinator of Transportation, House Doc. No. 89, 74th Congress, 1st Session.

> "In section 307 a proviso has been added to prohibit the issuance of a certificate to common carriers of passengers for operations over other than regular routes and between fixed termini, except in the case of special or charter operations. The bus industry differs from the truck industry in that there is no substantial need for operation over irregular routes. *The prohibition which has been added is a necessary measure of protection for regular route operators.*" (Emphasis supplied.)

The purpose of the regulation of brokers, and particularly of Section 311(a), was to prevent the breakdown of the regulation of carriers, both freight and passengers.[4]

Since the passage of the Act, its passenger carrier provisions have been interpreted only twice by this Court, so far as appellants have been able to ascertain. Both of these cases dealt with attempts of irregular operators to obtain authority to invade the traffic of the regular-route carriers. In *United States* v. *Maher* (1939), 307 U. S. 148, the Court held that irregular individual-ticket operations did not warrant the issuance of authority to provide regular-route service. In *Crescent Express Lines, Inc.* v. *United States,* (1943), 320 U.S. 401, 406, the Court held that "where passen-

---

[4] "The term 'broker was not defined in the original bill. The definition supplied is intended to cover the varied forms which brokerage operations now take. Without provision for the regulation of such operations the act would be seriously defective . . . The experience . . . has been such as to lead the Coordinator to believe that the brokers would have to be regulated and should be regulated because of the fact that *otherwise they would completely break down the rate structure and everything else in the carriage of either freight or passengers.* Remarks of Senator Wheeler, discussing Section 311(a), Cong. Rec. 5878, April 15, 1935.

gers made individual arrangements for their transportation" in "non-scheduled" service, the operation was a "special operation", rather than either a "charter operation" or a general "regular-route" operation, and called for the issuance of a grandfather certificate authorizing "special operations over irregular routes" but not general regular-route authority.[5]

The questions were substantial and the interpretations by the Court in *Maher* and *Crescent* are important because they carry out the intent of Congress to prevent the diversion of revenues from regular-route carriers, as a result of a breakdown of intended limitations upon irregular route "special operations" carriers. The instant case presents a far greater threat to regulation and to that Congressional intent than either of those cases, because it deals with a construction of the Act which permits *all* passenger carriers *as a class* to use their nationwide statutory irregular charter authority to invade the pleasure travel revenues of every other passenger carrier, whenever a broker sells the tickets, without assuming any of the responsibility for day-in-and-day-out-service on the route.

Under Title 49 U.S.C., Section 308(c), every holder of a regular-route passenger certificate, no matter how short the route, has the incidental statutory right to transport "special or chartered *parties*" from its area to any place in the United States. The term "special or chartered *parties*" in that section has always been interpreted as the equivalent of "charter operations" and to be distinguished from and to exclude "special

[5] Regular route authority includes the right to provide both "special operations" and "charter operations" over the authorized routes. See Jur. St. page 24.

operations" (i.e., individual-ticket operations). In *Regulations, Special or Chartered Party Service* (1941) 29 M.C.C. 25 the Commission held that construction to be necessary in order to carry out the Congressional intent and to give meaning to the Act and its protective provisions, declaring (pages 35-36):

> ". . . To permit carriers to deviate from their routes in offering a service to the public whereby the passengers may purchase individual tickets, and where, in many instances, the service would be performed over the route or routes of other carriers by motor vehicle, *would be tantamount to nullification of certificated rights.*" (Emphasis supplied.)

The opinion expressly held (pages 44-45) that the Regulations therein prescribed interpreted Section 308(c) as *not* authorizing "a non-scheduled service over irregular routes for which passengers purchase individual tickets", including "all expense tours, historic or sightseeing tours, excursions and travel to special celebration or events."

The statutory construction now before the Court authorizes operations identical with those found to be destructive of the Congressional intent, the provisions of the statute, and the certificate requirements, except that, here, *brokers* sell the tickets. The fact that *brokers,* rather the carriers sell the tickets, however, aggravates, rather than mitigating the destructive effect. As the Commission held in one of the opinions incorporated in the order in the present case (*Tauck Tours, Inc.—Extension, New York, N. Y.* (1949), 49 M.C.C. 491, 497):

> **"The question is thus squarely presented, whether these carriers, which lack the authority**

> **to conduct in their own names operations of the type here considered (namely the transportation of groups made up of purchasers of individual tickets), may nevertheless conduct such operations merely by reason of the intervention of a broker and the making of a group contract with him. If so, then much of our attempt at regulation in the field of motor passenger carriers, must largely be held for naught, at least insofar as concerns the regular-route carriers, which collectively form the backbone of the motor transportation of passengers."**

Emphasizing the point by specific example, the Commission recognized that the use of the broker under such circumstances would enable the carrier to operate to "any point in the country, over any route" and that the broker could sell the transportation to the passengers "at any rate he chose, without publishing such rates" (because the Commission has no jurisdiction over the charges of brokers and thus would be powerless to protect the rates of the carrier over whose certificated routes the operation would be conducted). The result, it found, would be that existing regular-route services would be "demoralized" and that "protection against unbridled competition which the Act is intended to afford (such carriers) . . . becomes a mockery."

The subsequent opinions, although endorsing those declarations, authorized the very operations there condemned, except that they (a) prescribe "conditions" which the decisions admit to be a mere formality[6] and which the court below held to be "none too

---

[6] Tauck Tours, Inc., Extension—New York, N.Y. (1952), 54 M.C.C. 291, at 303.

magical" but of "no harm"[7] and (b) attempt to limit the statutory class right to pleasure trips.[8] Not only is there no legal or statutory basis for limiting the alleged statutory class right to pleasure travel, but even if the distinction were valid, the destructive effect of the construction would not be substantially lessened. It is common knowledge throughout the bus industry, and has been repeatedly recognized by the Commission, that the principal interstate traffic of virtually all motor carriers of passengers, and the traffic *which supports* most interstate *scheduled service,* is the pleasure travel, both scheduled and non-scheduled, moving for the purposes named. That is why the Commission in the *Regulations* case, *supra,* expressly singled out that precise traffic as traffic which can only be transported pursuant to individual ticket authority and cannot be transported pursuant to charter authority.

None of the Motions to Affirm denies that Section 308(c) gives every bus line a statutory right to engage in charter service to every point in the United States, or that certificates specifically authorizing charter service are ordinarily territorial in scope and permit operations over all routes through vast areas. None denies that "special or chartered party service" under Section 308(c) has been held to be the exact equivalent of "charter operations" within the meaning of Section 307. None denies that the Commission's construction of the Act as permitting brokers to "employ" carriers with only charter authority over the routes traversed,

---

[7] Jurisdictional Statement, page 14a.

[8] Viz, sightseeing or pleasure tours, skiing trips, trips to attend athletic, social, religious, educational, musical, or theatrical event or for a similar purpose. *Tauck Tours, Inc., Extension—New York, N. Y.,* (1952), 54 M.C.C. 291 at page 303.

for the transportation of passengers to whom the broker has sold individual tickets, includes, by necessary implication, a holding that the carriers may use their charter authority for such transportation. None denies the validity of the Commission's finding, in the *Regulations* case, that to permit carriers to use their statutory charter authority to carry passengers to whom the carriers sell individual tickets would nullify the certificate provisions of the Act.

But not one of the Motions[9] faces up to the fundamental question of law presented, to wit:

If, as the Commission construes the Act, each of the hundreds upon hundreds of bus lines has a right to use its statutory nation-wide charter authority to carry individually-ticketed pleasure travelers over the certificated routes of all other carriers, whenever one of the hundreds of brokers and broker-agents sells the tickets—at a price not subject to the Commission's jurisdiction—

---

[9] Appellees' Motion (pages 7-8) misconstrues the issue to be whether the single broker (whose application happens to be the subject of the test case in which the validity of the claimed statutory class right is being determined) has operated "a device to provide scheduled passenger transportation by carriers which have no authority to render such service". The Commission construes the Act to include a statutory *class* right, and Tauck can have no such right as an incident of being a broker, unless *all* brokers as a *class*, have it, and the carriers it selects can have no greater right than *all* carriers selected by *all* brokers. The intent of the brokers is immaterial. *Every* exercise of the right is *pro tanto* a violation of the acknowledged Congressional intent to forbid use of charter authority to compete for individually-ticketed passengers. The palliative of Commission condonement or withdrawal of the right, based on the "ends" of each individual broker, not only would exceed the Commission's jurisdiction under the statute, and would defeat the clear intent of Congress, but would substitute discriminatory regulation by men for the prescribed regulation by law.

what remains of regulation, of what value is a certificate, how long can certificated operators survive such destructive competition, and how long will the public continue to receive the benefits of a stable, regular passenger transportation system? In short, does not the Commission's construction of the statute defeat the Congressional intent expressed in the Motor Carrier Act? That is the fundamental issue. It is the issue which not only dwarfs but encompasses and determines the subordinate questions to which the Motions are directed.

Point 2. The Motion of Appellees Should Be Denied

This extremely skillful Motion leaves a completely erroneous impression of the issues presented by this appeal. Contrary to its tenor, the issue here is *not* merely a naked question of classifying Tauck's all-expense tour groups as "charter groups" or "individually-ticketed passengers". "Appellants' basic contention" is *not* concerned merely with the naked language of Section 311(a), and appellants' argument does *not* rest on any assumption as to the definition of charter authority. Appellants' basic contention is that the Commission's construction of the Act in this case, as permitting the use of charter authority for the transportation of passengers who have purchased individual tickets, cannot fail to defeat regulation, is contrary to the Congressional intent expressed in the *entire* Act, including Sections 311(a), 307(a), and 308(c), and is irreconcilable with the prior Commission interpretations of the Act, even in this case,[10] which said that to allow that very thing would be to destroy the industry and regulation itself. The definition of charter service is neither the issue,

[10] Quoted supra, pages 6-7.

nor the basis of appellants' fundamental contention—it is merely one of the casualties of the challenged construction.

In addition to misconstruing the issue, the Motion (page 5) mis-states the test of charter service. The word "charter" appears, not in any Section of the Act relating to *brokers,* but in Sections 307(a) and 308(c), dealing with the authority of *carriers* to *operate.* The tests advocated in the Motion have never been used in determining carrier authority. Even in the present case below, the Commission holds that those tests may *not* be used, and the transportation is *not* charter transportation, where the carrier, an agent of the carrier, or a broker who receives a commission sells the tickets. In one of the leading cases on tour transportation, *Blue and Grey Sightseeing, Inc.—Common Carrier Application* (1938), 8 M.C.C. 124, 127-128, the Commission expressly held that the transportation of tours even "*where only members of the same organization are carried*"—patently a "bona fide" group under the Motion's test—is *special, not charter,* operations when the passengers make individual arrangements for their transportation. On the other hand, the transportation even of an "aggregate of passengers whose sole common interest is obtaining cheap transportation to a common destination" is *charter* service, if the "aggregate" forms a group prior to negotiations for transportation and conducts those negotiations as a group. Such charter groups are quite common, possibly outnumbering any other type.

The contention (Motion, pages 5-6) that the transportation performed for *Tauck's* passengers is "charter," rather than "special" operation, is particularly erroneous. That specific question was settled with

finality when **the carrier which provided the transportation for Tauck's passengers prior to regulation received "grandfather" rights, not for "charter" operations, but for "special" operations by virtue of that transportation!** *August Bingler—Common Carrier Application,* (1942), 41 M.C.C. 839 (not printed in full). Interpreting that certificate, the court, in *Bingler Vacation Tours* v. *United States* (1955), D.C.N.J., 132 F. Supp. 793, 796; affirmed per curiam 350 U.S. 921, declared:

> "Section 207 of the Interstate Commerce Act, 49 U.S.C.A., Sec. 307, anticipates, as the Commission pointed out at sheets 13 and 14 of its report, that certificates might be granted for three distinct types of motor carrier service: for operations over 'regular route or routes, and between fixed termini,' for 'charter' operations, and for 'special' operations. Although these admittedly are broad categories, they are meaningful and the certificate issued to Bingler clearly falls within the category of 'special' operations."

In the earliest leading case on tour transportation, *Red Star Sightseeing Line, Inc.—Common Carrier Application* (1937), 1 M.C.C. 521, the Commission had held that the *transportation* of all-expense tours which it specifically found to be identical with the tours Tauck sold (except for the luxury and expense involved), is *special* operations, rather than charter operations service.

The *Bingler* case and the Commission decision in *Asbury Park-New York Transit Corp.* v. *Bingler Vacation Tours, Inc.,* (1954) 62 M.C.C. 731, which it affirms—leading cases on tour transportation—reaffirm the holdings in *Red Star* and *Blue & Grey* and hold, in

recognition of the "three distinct types of motor carrier service" that a territorial special operations tour certificate requires that "something extra and something substantial be added to the bare transportation involved." If that be the criterion which distinguishes *special* operations tour authority, it cannot also be the criterion which *distinguishes charter* tour authority *from special* tour authority, as the court below now construes it to be!

As the Commission also found in *Bingler* (62 M.C.C. at page 739), the most common of all *special* operations certificates specifically authorize the *transportation* of the very type of tours which Tauck *sells*. Those certificates include the right to perform such transportation when the transportation is sold by Tauck or any other broker, as well as when sold by the carrier, and the present case below and numerous other cases specifically so hold. See *Tauck Tours, Inc., Extension—New York, N. Y.*, (1949), 49 M.C.C. 491, 500; *Riverside Tours, Inc., Extension—Special Operations* (1955) 63 M.C.C. 387, and other cases cited Jur. St. p. 24. In construing the Act to permit *charter* carriers *also* to perform that transportation, the decision below in the present case on its face destroys the intended statutory distinction between special and charter authority, and would permit Bingler to do, through the broker which sells its tickets, precisely what the Commission and the Courts said was unlawful for it to do directly, without even the price of the tickets being subject to regulation by the Commission.

Ignoring all of the foregoing authorities which directly decided the point, and relying solely upon an out-of-context excerpt from dictum in the *Fordham*

case,[11] the Motion (page 6) denies the perfectly obvious fact that the distinction between the two types of authority is destroyed by a construction which permits them to carry the same traffic. Its argument is refuted by the *Fordham* decision itself. The issue was whether a carrier, which had been engaged *exclusively* in the transportation of *corporations* and certain other similar groups, each of which, unlike the individually-solicited Tauck patrons, was admitted and found to have been formed *prior* to any negotiations respecting its transportation and to have conducted such negotiations *only as and for the group,* was entitled to special operations authority. It was also expressly admitted and found that, unlike the situation here, *there was no sale of individual tickets by anyone, directly or indirectly.*[12] There was no broker involved. The Commission and the Court held that such transportation was exclusively charter transportation and did not warrant the issuance of special operations authority.

In the course of its general discussion the Commission observed (page 297):

> "Charter service contemplates the transportation of groups such as lodges, bands, athletic teams, schools, or other travel groups assembled by someone other than the carrier who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour."

In the context of the groups there in issue, as well as the groups *specified* in the same clause—each of which

---

[11] *Fordham Bus Corp., Common Carrier Application* (1941), 29 M.C.C. 293 affirmed *Fordham Bus Corp.* v. *United States,* U.S.D.C.S.D.N.Y. (1941), 41 F. Supp. 712.

[12] Ibid, pages 296, 298.

was a *pre-formed* group—the words "other travel groups" obviously referred to other *similar* (i.e. *pre-formed*) groups.[13] Moreover, the opinion holds that the true distinction between special and charter operations was followed in *Red Star* and *Blue & Grey*. These cases, like *Bingler* and the other cases discussed supra, pages 11-13, refute the Motions's contentions both as to the nature of the specific transportation performed for Tauck's passengers and as to whether the present construction breaks down the distinction. Finally, the Commission, the court below, and the motions disavow the claimed meaning of the *Fordham* excerpt where "bare transportation" is involved, and hold the latter to be the *determinative* criterion, although neither *Fordham* nor any other case makes mention of any such criterion. The *Fordham* decisions, which *prevented* an attempt to break through the line into special operations, cannot support the present attempt to do so, but defeat both the construction below and the Motion.

Contrary to the contention on page 7 of the Motion, the rules prescribed in *Regulations Governing Special Or Chartered Party Service*, 29 MCC 25, 47-49, prohibit the *transportation*, in the guise of charter parties, of *any* passengers who buy individual tickets. There is nothing whatever in those rules limiting their application to the provision of "bare" transportation, or exempting such transportation when the tickets are sold by brokers.

The Motion's misconstruction of the fundamental issue and its proposal to substitute Commission discre-

[13] Compare the rule of *euisdem generis* applicable in statutory construction. See 50 Am. Jur. Statutes, Sec. 249.

tion for the prescribed statutory basis (Motion, pages 7-8) are discussed *supra,* page 9 note 9.

Finally, as shown in the Jurisdictional Statement, pages 34-35, the claim of expertise on page 8 of the Motion is entitled to little weight, where, as here, the Commission's construction not only determines its own statutory powers, but indirectly authorizes the use of the statutory charter authority for transportation which the Commission itself in previous interpretations, has heretofore uniformly said would destroy the industry and regulation itself and is forbidden by the Act. The Court needs no administrative expertise to see that the mere recitations of a fictitious agency, upon which the Commission's construction rests, do not change the legal irreconcilability of its interpretations, or the destructive effect of the construction.

Point 3. The Motion of Intervenor-Appellee, Tauck Tours, Inc. Should Be Denied

Ignoring the fundamental issue of the *effect* of the construction, the Tauck Motion (pages 2-3) defines the question as being whether the Interstate Commerce Act prohibits the procurement of charter transportation by brokers who sell individual tickets to the public. A direct answer to its question is "Yes", primarily because it *must* be so construed in order to prevent the use of the nationwide incidental charter authority of all carriers in the very way which the Commission itself has heretofore recognized would destroy the regulation of passenger carriers, and secondarily because the statutory provisions clearly so require.

The Motion (page 3) compares *Red Star, supra,* which held that tour transportation identical to that performed for Tauck is not "charter" but "special"

service, when the carrier sells the tickets, with cases holding that Tauck and others are "brokers". It overlooks the crucial point that Tauck's *carrier* was given grandfather *special operations* authority—*not* charter authority—on the basis of its operations for Tauck, on the ground that the *transportation* of individual-ticket passengers is special operations service, regardless of whether the carrier or a broker sells the tickets. *August Bingler Common Carrier Application,* (1942) 41 M.C.C. 839 (not printed in full.)

The absence of specific reference in the legislative history to arrangements of tour brokers (Motion, pages 3-4) is rendered immaterial (a) by the stated purpose of the provisions governing *all* brokers,[14] (b) by the fact that the Act *grants no "grandfather" rights to brokers,* (c) by the fact that the legislative history affirmatively indicates an intent to prevent the formation of sightseeing or excursion "groups" to enable otherwise unauthorized carriers to compete for the individually-ticketed passengers of authorized carriers,[15] and (d) by the fact that those very arrangements caused the issuance of a *special operations certificate* to the carrier which provided the transportation. Both quoted opinions overlooked those important facts. In further answer to them, nothing in the record could possibly justify a finding that the tour industry would be wiped out by a requirement that brokers comply with Section 311(a) by using properly authorized carriers in transporting tour passengers. Most such tour passengers use those services now. (See Jurisdictional Statement, pages 22, 24).

---

[14] See supra, p. 4, note 4.

[15] See supra, p. 3.

The discussion of the *Fordham* decision on pages 13-15, *supra,* applies to page 5 of the Tauck Motion.

The quoted (Motion, p. 6) finding of the court below—that the important consideration in determining whether the statute permits the transportation under charter authority is not whether the passengers form a group *before* and act as a group in the negotiations for transportation, but whether they are "interested in a trip for pleasure" and are "a cohesive whole" *after* such negotiations—ignores the destructive effect of such an interpretation upon regulation itself, heretofore uniformly recognized by the Commission. Would the same group be any *less* "interested in pleasure" or any less "cohesive" if the carrier or a broker who receives a commission had sold the tickets? Even in the present case below, the Commission holds that to construe the Act to permit the transportation under charter authority in the latter situations would nullify the Commission's "attempt at regulation in the field of motor passenger carriers". How can the intervention of a broker or the loss of his commission avert that result? That fundamental question is never answered in any of the decisions below or in any of the Motions.

The interpretation (Motion, p. 7) of the prohibitory Rule VI of the Charter Regulations, as permitting the transportation of individually-ticketed passengers not only nullifies the prohibition, but is precisely contrary to the Commission's own interpretation in prescribing it. See *Regulations, Special or Chartered Party Service,* (1941), 29 M.C.C. 25, at pages 44, 45.

The "substantial parity" argument (Motion, pages 7-8) is wholly inapplicable. In order to prevent con-

tinuation of broker practices which "would break down the rate structure and everything else in the carriage of either freight or passengers",[16] Congress withheld from brokers even "grandfather" rights to operate, and *a fortiori* withheld any right to retain the same "arrangements" as before. (See also Jurisdictional Statement, p. 28, note 49.) Even if such were not the case, "substantial parity" would require Tauck to use a carrier authorized to conduct special operations, not charter operations, as shown by the Commission's grant of "grandfather" *special operations* authority to Tauck's *carrier*.

Point 4. The Other Motions to Affirm Should be Denied

The arguments in the Motions of Appellee-Intervenors, American Society of Travel Agents, Inc., and Thomas Cook & Son, Inc. and Parker Tours, Inc., et al, are substantially similar.

The principal contention of both is that the issues presented are merely "questions of fact" as to "the nature of Tauck's operations", from which they argue that the construction is not reviewable, citing *N.L.R.B.* v. *Hearst Publications* (1944), 322 U.S. 111, and *N.L.R.B.* v. *Coca Cola Bottling Co.* (1956), 350 U.S. 264.

That contention is untenable. The Commission's decision construes the statute, as a matter of *law*, to afford all brokers a statutory class right, as an incident of their status, to use carriers with only charter authority for the transportation of passengers who buy individual tickets for purposes of pleasure travel. Implicit in that construction is the further construc-

[16] Supra, p. 4, note 4.

tion that, as a matter of law, all carriers with either statutory or certificated charter authority have a statutory class right, as an incident of their status, to carry passengers who have bought individual tickets from brokers over the certificated routes of all other carriers. The questions presented are not in any sense questions of fact, but are questions of the *legal* irreconcilability of those constructions with (a) the Congressional intent as expressed in the Act as a whole, (b) the prior holdings of the Commission that to permit such charter authority to be used for the transportation of *any* passengers who buy individual tickets would destroy the industry and nullify regulation, (c) the prior interpretations by the Commission that such use is prohibited by the Act, (d) the express prohibitions in the charter regulations against the use of charter authority for the transportation of *any* passengers who have bought individual tickets, and (e) the express prohibitions in the Act against the *indirect* conduct, through intervention of a broker, of operations which could not be conducted *directly* without the broker. If these are factual questions, there is no such thing as a question of law.

Conceptually, the question of the validity of the Commission's construction is no more a question of fact, and is entitled to no more weight by the Court than if the Commission had construed the Act to grant all holders of *property* certificates a class right to transport *passengers* over the routes named in the certificates.

Neither *Hearst* nor *Coca Cola* is in point. *Hearst* involved merely the question of determining whether particular persons fall within a statutory definition of "employees", and the Court upheld the Board's

determination, in favor of the remedial purpose. In *Coca Cola*, the Court upheld another definition by the Board, on the ground that it accorded with the lay definition and was a reasonable (i.e., "not too far fetched") construction of the statute. Here, although the Commission's long-established definitions were necessarily destroyed in the process of the construction, the construction itself was not merely the prescription or application of a definition, but an interpretation of the statutory class rights of all brokers and all holders of charter authority. The fundamental question it raises is the *legal* question whether the remedial purpose of the Act will be defeated by the universal class rights which the construction creates.

The Society Motion quotes the holding of the Court below that the rules prescribed in the *Regulations* case[17] do not apply to charter authority specifically granted in certificates. Both the Court below and the Motion overlook the fact that the present construction applies to charter authority emanating from *both* sources, hence is at least *pro tanto* in violation of the regulations (See Jur. St. pages 29-31).

The intimation that the statutory construction in this proceeding is merely an "interpretative ruling", not requiring compliance with the rule-making requirements of the Administrative Procedure Act, (5 U.S.C. Section 1003) is wholly untenable. The construction is not a mere informal "guide as to policy" or tentative interpretation of the regulations, but a formal violation of the explicit provisions thereof which prohibit the transportation, pursuant to charter

---

[17] *Regulations—Special or Chartered Party Service* (1941), 29 M.C.C. 25.

authority, of passengers who purchase individual tickets. If such a construction can be made in such a proceeding in the guise of an "interpretative" rule, the settled rule that an administrative regulation binds the administrator, as well as the rule-making procedures prescribed in the Administrative Procedure Act for "amendments" of regulations are effectively nullified.

CONCLUSION

The statutory construction challenged in this appeal involves the class rights *inter sese* of all carriers and brokers of passenger transportation by motor vehicle. In granting virtually the entire industry the right to raid at will, with the assistance of the broker industry, the individual-ticket pleasure traffic of all other carries, the construction strikes at the heart of regulation. It raises questions so substantial as to warrant further argument and plenary consideration on the merits by the Supreme Court. The Motions to Affirm should be denied.

Respectfully submitted,

JAMES F. X. O'BRIEN
JACK R. TURNEY, JR.
Attorneys for Appellants.

Dated: February 17, 1957.

PROOF OF SERVICE

I, Jack R. Turney, Jr., attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc., appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of February, 1957, I served copies of the foregoing Brief on the several parties, as follows:

On the United States, by mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Tauck Tours, Inc., appellee-intervenor, by mailing a copy in duly addressed envelope with postage prepaid to Francis V. Goggins, Esquire, 60 East 42nd Street, New York, New York;

On American Society of Travel Agents, appellee-intervenor, by mailing a copy thereof in duly addressed envelope with postage prepaid to Jerrold Scoutt, Jr., Esquire, 777-14th Street, N. W. Washington 5, D. C.

On Thomas Cook & Son, Inc., Parker Tours, Inc., et al, appellee-intervenor, by mailing a copy thereof in duly addressed envelope with postage prepaid to S. Harrison Kahn, Esquire, Investment Building, 1511 K Street, N. W., Washington 5, D. C.

JACK R. TURNEY, JR.
Attorney for National Bus Traffic Association, Inc. and Hudson Transit Lines, Inc.

No. 661. NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *James F. X. O'Brien, Jack R. Turney, Jr.* and *Eugene T. Lüpfert* for appellants. *Solicitor General Rankin, Assistant Attorney General Hansen, Daniel M. Friedman, Henry Newton Williams, Robert W. Ginnane* and *Isaac K. Hay* for the United States and the